In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 78-37

DEWAYNE F. TITUS,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Subject Index

Appeals (Pet. App. A) denying the petitioner's petition for rehearing, with the suggestion for rehearing *en banc,* is unreported. The judgment of conviction by the District Court is also unreported (Pet. App. C).

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1978. A timely petition for rehearing with the suggestion for rehearing *en banc,* was denied on May 25, 1978. A motion for an extension of time for an additional ten days in which to file the petition for certiorari (through and until July 5, 1978) was filed with this Court on June 26, 1978. A ruling on that motion has not been received as of the time this petition is being transmitted to the printer. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals apply the proper standard for determining whether or not the petitioner had suffered actual prejudice as a result of preindictment delay and for determining whether or not the petitioner had been denied Due Process as a result of preindictment delay?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law * * * .

STATEMENT

1. The Health of the Petitioner.

The issues of this appeal turn, in significant part, upon the issue of the petitioner's health.

The petitioner is a 53 year old businessman who has lived in the San Francisco Bay Area for a number of years. He was one of ten children, eight brothers and two sisters; both of his parents are dead of heart related ailments. His surviving brother is in a permanently disabled condition from heart disease. All of his remaining brothers have died of coronary related ailments. Both of the petitioner's sisters are victims of chronic hypertension.

In 1959, DeWayne Titus began having difficulties himself with heart disease.[2] It began with heart and chest pains and developed into a condition requiring repeated hospitalization and regular supervision by a cardiac specialist. In 1972, he was diagnosed as suffering diffuse coronary disease. However, his condition worsened, and he was hospitalized for a second time in November of 1973.

The petitioner's health continued to deteriorate thereafter. He experienced pains in his chest, angina pectoris, growing to five and then more seizures per day. Finally, just after the indictment was handed down in this case,

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[2]Pet. App. D, E & F include reports of three physicians with regard to the petitioner's health. Pet. App. D is a letter report of the cardiologist appointed by the Court at the time that he determined the defendant could stand trial under certain conditions. App. E contains the letter of the petitioner's personal physician submitted at the request of the District Court after the petitioner suffered a collapse on the eve of the scheduled trial date in the summer of 1975. App. I is the testimony of a defense cardiologist which was presented at the sentencing hearing in July, 1976.

DeWayne Titus underwent surgery for a coronary bypass. The operation was labelled a success. Within two months of the operation, his health began to deteriorate again, and the petitioner developed a condition referred to as "unstable angina pectoris." The petitioner's general condition was characterized as becoming highly critical.

The manner in which the unstable angina pectoris was controlled was by progressive increases in the dosage of certain drugs. During this period, the District Court found it necessary to recess for a time in order for the petitioner to regain stability. When stability was obtained, the number of daily episodes of angina pectoris had risen to between ten and fifteen. Since the angina had stabilized, however, Dr. Elliot Rapaport, a court appointed physician who examined Titus when he had moved to dismiss the indictment because of his poor health, indicated his opinion that it was "reasonable to go ahead [with trial] judiciously" so long as certain restrictions in the conduct of the trial were followed. (Pet. App. D). Dr. Rapaport's conclusion was disputed by Titus' attending physician, Dr. Roger Johnson. These opinions were rendered in May, 1975.

On June 19, 1975, eleven days after his motion to dismiss the case was heard, and awaiting trial scheduled for July 7, 1975, Titus suffered a new, unexplained heart episode. He was rendered unconscious and was taken by ambulance to the hospital where he was confined for ten days. That is, two years after Titus' first experienced unconsciousness, nine months after Titus had undergone "successful" surgery, and almost immediately after a court appointed specialist had concluded that he was fit

for trial, DeWayne suffered a cardiac episode of such intensity that it rendered him unconscious and required hospitalization. Mr. Titus remained in the hospital until June 28, 1975. The commencement of the trial was postponed until September 15, 1975. Between June and September 1975, further tests and evaluations of Mr. Titus' health were made which at no time improved. (Pet. App. E). The record in this case clearly establishes that Mr. Titus suffers from an irreversible cardiac condition of the severest magnitude. Dr. Leonard Karpman, a specialist in cardiology at Kaiser Hospital in San Francisco, testified that Mr. Titus' cardiac condition is one of the worst he has ever diagnosed, and is beyond medical remedy. Mr. Titus' condition requires constant and sophisticated medical attention and medication. Dr. Karpman testified that it was a "medical miracle" that Mr. Titus was able to survive his trial. (Pet. App. F).

Dr. Karpman testified that if Titus was required to serve a prison sentence, his already deteriorated health would be exacerbated and early death, a certainty. Nevertheless, the District Judge sentenced DeWayne Titus, although he had no prior criminal record, to two years imprisonment.

2. The Transactions and the Evidence.

There are five counts in the indictment upon which Titus was tried. The overwhelming bulk of the tax liability in this matter involved two transactions.[3]

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[3]In dispute between the petitioner and the United States is a tax liability of approximately $250,000. All but a few thousand dollars of this tax liability rests on the findings regarding the two transactions discussed above. The balance of the transactions which were the subject of the indictments uniformly included

The Dymo Stock

The finding of the District Court of guilty on the second count rested exclusively on its finding that the defendant failed to report a significant portion of the income from the sale of the stock of Dymo Industries which took place during 1967. The issue before the trial court was essentially one of whether or not Mr. Titus had intentionally or through gross negligence withheld from his accountant, Robert Greer, the proper information upon which to compute the basis for his purchase price of the Dymo stock.

The Sale of the Twenty Acre Parcel

At the beginning of 1968, DeWayne Titus, in joint tenancy with his wife, owned a parcel of land located in Alameda. In September of that year, Del Monte Corporation began secret maneuverings by which it intended to purchase that property. The property was ultimately purchased by Del Monte Corporation in January, 1969. During the fall of that year and, before Titus had any knowledge that there was a pending sale[4] to Del Monte Corporation, Titus sold the property under an installment sale contract to a corporation which he owned, Barbary Coast. The court found Titus guilty of offenses relating to this transaction on two counts:

1. In Count Four, the District Court found Titus guilty of falsely reporting the installment sale transaction

instances where the testimony of Robert Greer was used, almost exclusively, to establish that Titus had willfully failed to communicate information to Greer necessary for the preparation of correct tax returns.

[4]Titus' prior knowledge was the subject of bitter dispute and was the source of extreme prejudice to Titus as a result of the preindictment delay.

to Barbary Coast in 1968 though the government never contested that a legally binding sale under the California law took place;

2. In Count Five, the District Court found petitioner guilty of failing to report the income received from the sale of the property between Del Monte and Barbary Coast which occurred in 1969 on his 1969 income tax return.

The government's proof of Titus' guilt in this transaction rests upon the following:

1. Testimony regarding the meeting where the sale to Barbary Coast was allegedly conceived as a plan to commit tax fraud;

2. The government's attempt to cast doubt upon the recorded and binding sale contract between Titus and Barbary Coast which was recorded in Alameda County; and

3. The testimony of Richard Thomas, who assisted in the preparation of Titus' 1968 and 1969 income tax returns regarding information which was allegedly intentionally withheld by Titus.

The evidence regarding these transactions hinged upon the testimony of Robert Greer who was a reformed alcoholic, and, to a lesser extent, on the testimony of Richard Thomas. Robert Greer was the accountant who prepared the 1967 tax return, the return involving the Dymo stock transaction, and who was present at the "Barbary Coast meeting," and who was present and was a principal witness against Titus with regard to the alleged conspiracy which took place at that meeting. In substantial part, the factual issues in this trial boiled down to a

resolution of the conflicts in testimony between that of Robert Greer and that of the petitioner, DeWayne Titus. The testimony of Richard Thomas was also of importance in this trial because Mr. Thomas was the accountant who prepared the actual and/or amended returns for the years 1968 and 1969. As will be discussed, *infra*, Mr. Thomas' recollection was severly hampered by the period of delay between the actual time of his work and the time of the trial. Also during that period, a substantial portion of his papers were lost and he was unable to refer to them to refresh his recollection with regard to his transactions with Mr. Titus and his staff.

3. The Investigation of the Petitioner.

The Internal Revenue Service began its investigation of the tax affairs of DeWayne Titus in 1965. The Internal Revenue Service escalated its investigation in August, 1970, when IRS Agent Ronald C. Williams began an intensive investigation of Titus' 1967 and 1968 personal tax returns. Titus was informed of the investigation on September 4, 1970, by Agent Williams and during September, 1970, Titus pressed the agent to hasten his investigation and to bring it to a conclusion. In December, 1970, the agent called Titus regarding the investigation and gave *Miranda* warnings. From that date on, Titus' attorney, Gordon Nelson, continued to provide the IRS agent with various documents requested by him, although Titus himself had personally refused to hand them over.

On February 16, 1971, Titus filed his 1969 income tax return. Since Titus' IRS file was red tagged, meaning

that a criminal investigation was in progress, the return was forwarded directly to Agent Williams. On March 2, 1971, a summons was issued for Titus' corporate records. Attorney Nelson turned those records over to Agent Williams on March 28, 1971.

In October, 1971, Agent Williams met with Richard Thomas, the accountant who had prepared Titus' 1969 income tax return. Titus had no knowledge of that meeting.

In March, 1972, Titus wrote Agent Williams expressing anxiety over the long-delayed investigation of him and over continuing rumors of a pending indictment. Titus told Williams he suffered from a debilitating and progressive heart disease which was aggravated by this anxiety. The government waited eight months until it made any inquiry on its own regarding the status of Titus' health.

On November 27, 1972, Williams and another IRS agent met with Titus and accountant Thomas in order to have Titus explain items in the tax returns under investigation. On November 28, and December 6, 1972, the government finally questioned Titus' attending physician and another specialist and was informed that Titus' condition was progressively deteriorating. The doctors said that Titus could not stand trial because of the stress involved.

In December, 1972, Agent Williams ended his investigation and forwarded his conclusions and recommendations to his superiors. In that report, he included information concerning the state of Titus' health. On December 29, 1972, William D. Howard, Chief of Intelligence for

the IRS, wrote a letter recomending prosecution of the petitioner. (Pet. App. H). Despite information concerning the adverse effect of anxiety on Titus' health, the file was passed among various federal bureaus for approval over the period of the next fourteen months. We know from the affidavit of John M. Youngquist, Assistant United States Attorney, that it was not until July 25, 1973, over six months after Agent Williams concluded his investigation, that the file was forwarded by the Internal Revenue Service's Office of Western Regional Counsel to the Department of Justice in Washington with a recommendation for prosecution. (Pet. App. I). From that date until February 19, 1974, the case was under further review by the Criminal Section of the Tax Division of the Department of Justice in Washington. On February 19, 1974, the Department of Justice returned the case to the Office of United States Attorney for the Northern District of California. Finally, there was a delay of another seven months until July 24, 1974, when presentation of the case to the grand jury began. The indictment was returned on August 7, 1974, nineteen months after the completion of the investigation. No further investigation was done by the Internal Revenue Service or by the Department of Justice after December, 1972.[5]

Since 1971, three material witnesses to the defense had died. These persons were Eileen Emmons Smith, Fred Bitterman and Warren Haskell. Haskell and Bitterman died in 1972, nearly two years after Agent Williams had

[5]That is, after the completion of Agent Williams' investigation, which took twenty-eight months, and the other Intelligence and IRS investigations which had been going on since 1965.

told the petitioner of the existing Internal Revenue Service investigation. Eileen Emmons Smith died in October, 1974, forty-five months after Agent Williams had given Mr. Titus his *Miranda* warnings and two years after the indictment was returned. In addition to the witnesses that had died, three other witnesses who had played a significant part in the prosecution were unable to recall all or part of the events relating to the transactions which were the subject of the prosecution. J.B. Kidwell, an officer of Eureka Federal Savings and Loan, had, by the time of the return of the indictment become too aged and infirm to remember the events which occurred in 1968 and 1969. Two of Titus' accountants, Robert Greer and Richard Thomas, were unable to recall events which were at the heart of the transactions which were the subject of this prosecution. The work notes and papers of both accountants had been lost during the intervening five to eight years between the events and the time of the trial.

4. The Nature and the Course of the Lower Court Proceedings.

A five count indictment charging violations of the Internal Revenue Code, 20 U.S.C. Sections 7201 and 7206, was returned against DeWayne F. Titus on August 7, 1974. Titus was admitted to bail in the amount of $50,000 on August 9, 1974. At subsequent hearing, in September, 1974, Titus was released on his own recognizance.

Immediately after being released upon his own recognizance, Titus was forced to undergo coronary vein bypass surgery in September, 1974. Following the surgery, petitioner was permitted to recuperate until January, 1975, at which time the court appointed a cardiologist, Dr. Elliot Rapaport to evaluate the petitioner's physical

condition. After the completion of the evaluation, the Court recessed proceedings for additional time until May, 1975.

In May, 1975, after a hearing in which the two physicians, Dr. Elliot Rapaport and Dr. Roger Johnson, rendered opinions that disagreed on whether or not the trial should proceed, the District Court set the trial to commence in July, 1975. Before the trial could commence, on June 19, 1975, the petitioner was rendered unconscious and rushed to the hospital where he remained for ten days. The commencement of the trial was delayed until September, 1975.

Once it had commenced, the trial proceeded with two to four hour sessions over a period of seven months. The findings of the Court were rendered in May, 1976.

The judgment of the District Court was entered on July 27, 1976 in which the District Court sentenced Mr. Titus to two years imprisonment on each count of the indictment, to be served concurrently, and fines totalling $18,000.

REASONS FOR GRANTING THE WRIT

I

PREINDICTMENT DELAY

1. The State of the Law.

This Court established, in *Marion v. United States*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) that preindictment delay is to be measured by the Due Process Clause of the Fifth Amendment to the United States Constitution. In that decision, the Court did not establish a test but instead urged:

> To accomodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances in each case. It would be unwise at this juncture to forecast our decision in such cases. *Id.* at 325.[6]

The development and evaluation of pre-indictment delay has been at best, erratic since that time. Confusion in the circuits was immediately engendered in establishing the constitutional measure of pre-indictment delay. Most courts have fixed upon the government concession from *Marion* as marking the elements of the test. The diversity begins there.

The Fifth Circuit has applied the elements using the subjunctive; that is requiring *both* prejudice *and* intentional delay to find a violation; *United States v. Duke*, 527 F.2d 386, 390, cert. denied 426 U.S. 952, 96 S.Ct. 3177, 49 L.Ed.2d 1190 (1976). The Third Circuit has applied the test in the disjunctive, considering only the issue of prejudice. *United States v. Dukow*, 453 F.2d 1328, 1330, cert. denied, 406 U.S. 945, 92 S.Ct. 2042, 32 L.Ed.2d 331 (1972). The District of Columbia Circuit[7] has applied both tests.

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[6]In another portion of the opinion of the Court, there was quoted a concession from the Solicitor General which has engendered much of the controversy:

> Thus the government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at the trial that the preindictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. Id. 324.

See *United States v. Mays*, 549 F.2d 670, at 675 (1977).

[7]Compare *United States v. Parish*, 152 U.S.App.D.C. 72, 468 F.2d 1129, 1132, cert. denied, 410 U.S. 951, 93 S.Ct. 1430, 35 L.Ed.2d 690 (1973), and *United States v. Pollack*, 175 U.S.App. D.C. 227, 534 F.2d 964, 969 (1976).

The Ninth Circuit has applied both tests and has also created a third test.[8]

Of equal importance with the conflict over "subjunctive v. disjunctive" is the test which is evolving in the determination of what constitutes "substantial" or "actual" prejudice. The evolving rule places the burden on the defendant to establish this element irrefutably, *United States v. Mays, supra,* at 677-680.

The standard applied by the circuit courts, such as that in *Mays,* imposes a responsibility upon the defendant which it is impossible for him, as a practical matter, to meet. Restated, the defendant's burden, is to establish independent of his own testimony[9] that lost witnesses, testimony and documents are exclusively favorable to him.

But the best analysis of the burden placed on the defendant by the Court in *Mays* and in other cases (and on the petitioner here) is reserved to Judge Ely, who dissented in the *Mays* decision:

> My Brothers strain to the uttermost limits in arguing that the death or dimmed memories of potential defense witnesses does not *actually* prejudice a defendant unles he can demonstrate the extent to which those witnesses would have testified, respectively, had

[8]Compare *United States v. Sand,* 541 F.2d 1370, 1373 (1976) and *United States v. Andros,* 484 F.2d 531, 533 (1973) (subjunctive) *United States v. Mays, supra,* at 677-678 creates a balancing test.

[9]The *Mays* court found the defendants' affidavits to be without merit as being "self-serving." *Mays,* at 679. In a cryptic footnote the Court states: "The lack of supporting evidence would perhaps not be considered *so adversely* to the defendants in a situation where they had no notice of the possibility of criminal indictment." Id. at fn. 17. (Emphasis added).

"No notice." Is the Court of Appeals somehow implying that some bizarre extension of the mitigation of damages doctrine applies in a Due Process context?

> they lived or their memories remained unobscured. The obvious question, as the majority recognizes, is in what manner can the defendant show the particular witnesses no longer available or laboring under stale memories could enhance his defense if the government had proceeded through indictment judiciously? (Citation omitted). "In a very real sense the extent to which he was prejudiced is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice." (Citation omitted). The obvious answer, in the overwhelming number of cases is, I should think, that the burden of summoning affidavits from buried bodies or dimmed minds will be insurmountable.

The practical impossibility of meeting a burden, I concede, does not suggest necessarily that the burden is erroneously defined. *Id.* at 682.

It is often urged in this same context, as a counterweight, that "delay works against the government as well as the defendant." The due process guarantee is not offered to the government but, rather, to the defendant. It is the defendant, rather than the state who is to be protected from the overstale prosecution resulting from government malignance or underbudgeting.[10]

Most relevant, such glibness ignores the underlying premise that the judicial process is designed to determine truth from the evidence. Where the government's evidence is stale, as well as the defendant's the prejudice to the system is doubled rather than "halved" or "erased."

[10]*Mays, Dissent, supra,* at fn. 3.

In his articulate dissent, Judge Ely in the *Mays* case took time to propose a most-acceptable alternative to the test established by the majority in that case and applied to the petitioner herein: "The question for the trial judge should *not* be whether the record viewed in light of independently proved potential testimony of now-deceased witnesses, indicates that the defendant is either guilty or innocent as charged. Rather, the inquiry should be whether that determination can be made, ultimately, in a form wherein the judge has confidence that the pertinent transactions can be reconstructed accurately." Id. at 682.

In Judge Ely's determination, he would measure the defendant's showing of *materiality* of the missing testimony or documents rather than measuring, or "attempting" to measure whether or not those missing elements can *absolutely* be shown to prove the defendant's innocence. Judge Ely would also permit the government to rebut any showing of prejudice by a showing on its part that the missing evidence for testimony was wholly inculpatory.[11]

Finally, though not specifically discussed in either the majority opinion or the dissent in the *Mays* case, a rule which requires the defendant to prove beyond peradventure that the missing evidence is wholly exculpatory ignores one of the most important and time-honored elements of the adversarial process: cross-examination. It is well known to every trial attorney that even the most inculpatory affidavit cannot always withstand the withering fire of cross-examination. What more telling evidence

[11]Such a rule would have a dual purpose in that it would encourage the government to further explore all avenues of evidence and to preserve evidence rather than to destroy it.

of innocence can there be for a defendant than devastation of government witnesses by cross-examination?[12]

2. The Instant Case Provides this Court with an Opportunity to Adjust the Measure for Actual Prejudice Under Marion.

The prosecution in this case offers this Court the opportunity to establish in a very clear and specific manner, the test to be applied for actual prejudice, not only for missing evidence, but also prejudice as a result of other factors.

Between the time of the commencement of the IRS investigation, and a period of time two months after the return of the indictment, three critical witnesses died.

Two of those witnesses, Warren Haskell and Eileen Emmons Smith, were directly involved in bookkeeping and accounting responsibilities for the defendant.[13]

Under the test which Judge Ely would have us apply, the petitioner here has suffered actual and substantial

[12]One could even feel that the majority opinion in the *Mays* case has studiously ignored this possibility. In its comments, at page 680, the majority writes "As it stands now, a trier of fact might well assume that the decedents would have placed *all* of the blame on the defendants as to assume that they would have *exonerated* them." A statement such as the one quoted, ignores the possibility that, after the decedent witnesses had testified that the defendant was wholly *culpable*, sharp cross-examination may have shown that, in fact, their testimony was wholly *incredible*. The effect of such a showing on a jury would be very likely to lead to acquittal.

[13]During the proceedings on the District Court level, the strict importance of Mr. Haskell alone was discussed. It was conceded at that time, that before the death of Eileen Emmons Smith, any testimony Mr. Haskell could have provided regarding the knowledge and responsibility of the petitioner concerning the preparation of his individual income tax returns and the details of his financial affairs, could have also been provided by Eileen Emmons Smith. Her death, in October, 1974, less than ninety days after the return of the indictment, made that impossible.

prejudice. The substance of three of the five counts in the indictment is based upon transactions similar to that involving the Dymo stock transfer. That is, that certain incomes, such as rents, which the petitioner had received, were not properly reported or were not reported at all on the petitioner's income tax returns for 1967 and 1968. A hotly contested issue at trial was whether or not the failure to report those items was the result of the negligence of Robert Greer, perhaps generated by his alcoholism, or were the result of the intentional or gross negligence on the part of the petitioner. To these transactions (the reporting or non-reporting of the incomes by the petitioner) Eileen Emmons Smith and Warren Haskell were the persons who had the closest and most intimate knowledge outside of the petitioner himself. Particularly Mrs. Smith played an important and close role as Mr. Titus' personal accountant, personal and chief bookkeeper. Mrs. Smith's involvement in the affairs of Mr. Titus permeates the record. For example, Mr. Greer admitted during his examination that Mrs. Smith was the person who made the entries in the check register upon which he based his judgment that DeWayne Titus owed additional rental income which was the subject of one of the counts of the indictment (RT 0615).[14]

At another point in the examination of Mr. Greer, Mr. Titus ineptly attempted to point out (RT 0527-0528) that Mrs. Smith would have been able to provide testimony concerning the alcoholism and the unreliablity of Robert Greer.

[14]The abbreviation RT refers to the reporter's transcript of the case, which is on file with the Court of Appeals.

Richard Thomas, another "pivotal" prosecution witness also testified that he received information from Eileen Smith (RT 0818).

The information presented regarding Eileen Smith and Warren Haskell and their relationship to the dispute between the credibility of the petitioner and the credibility of Robert Greer applies equally to Fred Bitterman, another potential defense witness. One of the critical issues relating to the sale of the twenty acre parcel was whether or not the petitioner had, at the time he had allegedly conspired to evade the income tax from the sale, any knowledge whatsoever that the sale was pending. On this issue, the testimony of Fred Bitterman, who died before the return of the indictment, and the testimony of J. B. Kidwell, who was senile and unable to remember any of the relevant transactions at the time of the trial, would have been critical. These two gentlemen were officers of Eureka Federal Savings and Loan, the financial institution which transmitted Del Monte's secretly prepared offer to DeWayne Titus for the first time.

The petitioner was further hampered in the presentation of his case and in the cross-examination of witnesses in a serious way, by the faded memories of several key witnesses and by the numerous documents which were missing or unavailable at the time of trial.[15]

[15]Rather than consume the Court's time in further elaborating the detailed areas of actual prejudice to the petitioner with relationship to lost evidence, the petitioner has included as part of his appendix that portion of the supplemental transcript references provided to the Court of Appeals which related to the missing documents and/or testimony. (Pet. App. K).

3. The Prejudice Resulting from Factors Other than the Loss of Witnesses and Testimony.

The Statement of this Petition provides this Court a detailed statement of the petitioner's health condition. There was significant deterioration of that condition while the government dallied in prosecuting its case through an investigation of several years and through a nineteen month post investigation delay. Petitioner's Appendices D and E provide this Court with a description of that deterioration. By the time the petitioner was indicted, he was on the brink of open-heart surgery. How can a man constitutionally defend charges as serious as those levelled by the United States in this case when he cannot walk up stairs without chest pain?

That question raises the remaining issue of the petitioner's financial devastation. In the words of the government, DeWayne Titus had "hundreds of thousands of dollars at his disposal"[16] in 1969. The delay in prosecuting Titus found him in 1974 without funds[17] to pay for his defense.[18]

[16]Appellee's Reply Brief in the Court of Appeals, p. 55.

[17]The Court may judiciously notice that the petitioner filed a personal bankruptcy on June 21, 1976. (No. 3-76-788). Many of the companies Titus operated are now bankrupt as well.

[18]Titus requested that he have a court appointed attorney advisor and expert assistance pursuant to 18 U.S.C. 3006A. He, however, declined to provide financial information in open court or by public document because of the "assets" issues in the prosecution. The District Court declined to conduct an *ex parte* hearing to determine financial status and, instead, found a waiver. Mr. Titus obtained an attorney advisor after the trial commenced who is now a creditor in his personal bankruptcy for a considerable sum.

Whatever the course or motivation of the government delay,[19] the indictment found Titus in 1974 without funds for a lawyer and in extremely poor health. Such factors could not help but drain one's ability to present a vigorous defense against ever-serious charges.

CONCLUSION

We ask the Court to affirm the words of Judge Ely:

> [T]he negative power of the Government to withhold prosecution for tactical reasons is perhaps of greater *potential* harm than the affirmative power to prosecute because comparatively, it is much less protected against abuse.

In the case of DeWayne F. Titus, as in the instance of many defendants measured by the *Mays* standard, justice delayed is justice denied, and without redress.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

ORRIN LEIGH GROVER
Attorney for Petitioner

June, 1978

[19]Despite the fact that the government could not decide whether or not to proceed criminally, the IRS actively pursued liens, particularly for various business taxes, and exacted 100% penalties. Their levies were an important factor in Titus' financial collapse.

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Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 76-2901

United States of America,
Plaintiff-Appellee,

vs.

DeWayne F. Titus,
Defendant-Appellant.

[Filed May 25, 1978]

ORDER

Before: MERRILL, KILKENNY and CHOY, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

ATTACHMENT C

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 76-2901

United States of America,
Plaintiff-Appellee,

vs.

DeWayne F. Titus,
Defendant-Appellant.

[Filed Mar. 29, 1978]

On Appeal from the United States District Court
for the Northern District of California

OPINION

Before: MERRILL, KILKENNY and CHOY, Circuit Judges.

CHOY, Circuit Judge:

Titus appeals from his judgment of conviction in a trial to the court on five counts of tax fraud under 28 U.S.C. §§ 7201, 7206(1). We affirm.

Appellant's contention that the district court denied his sixth amendment right to counsel is spurious. It is clear from a reading of the record that what Titus sought was to represent himself, and also to have an attorney-advisor appointed at government expense. Yet he was adamant in his refusal to fill out and sign the financial affidavit (in support of request for attorney, expert or other court services without payment of fee), Form CJA 23, to establish his indigency. *See United States v. Ellsworth*, 547 F.2d

1096, 1097-98 (9th Cir. 1976), *cert. denied* ..... U.S. ..... ( ).

The district court demonstrated remarkable patience in dealing with Titus who claimed he was better able to handle the trial than could any attorney. The court explained several times the necessity for Form CJA 23 to be executed, and that the information contained in it could not be used against Titus in any civil or criminal case, but that false statements therein could expose him to a perjury charge. After extended colloquies with him about his refusal to hire his own counsel or to sign CJA 23 to qualify him for court-appointed counsel, the court told Titus such refusal was deemed a waiver of court-appointed counsel.[1]

We agree. *See Ellsworth*, 547 F.2d at 1097-98.

We find to be frivolous appellant's second argument that he was deprived of the right to trial by jury—that he was coerced into waiving that right. Waiver originated with Titus who said he wanted to shorten the trial and that he preferred a judge to a jury in an income tax evasion trial. Nevertheless, the court, prior to approving the waiver of jury, was careful to reconfirm appellant's desire to waive jury after explaining at length the advantages of having a jury trial, and was satisfied that Titus knowingly and intelligently was making that election. Titus then signed a written waiver of jury trial.

Appellant's next contention is that the nineteen-month delay[2] in indicting him on the tax fraud charges after the

[1] Actually, however, Titus was accompanied from the start of the trial by his privately-retained lawyer who sat for the first three days in the spectators' section of the court, but from the fourth day on sat with Titus, assisted him in some cross-examination, actually conducted direct and cross-examination, objected to evidence, argued motions, and delivered closing argument.

[2] He says it took the IRS six months to review the results of its investigation, seven months to "appoint an attorney" and four months to present the case to the grand jury.

Internal Revenue Service (IRS) had completed its investigation of his tax affairs prejudiced him and requires dismissal of the indictment. The district court denied Titus' motions to dismiss for alleged deprivation of his fifth amendment right to due process by the pre-indictment delay. His grounds for claiming prejudice were his deteriorating physical condition, missing documents, death of three witnesses, and faded recollections of other witnesses.

In *United States v. Marion,* 404 U.S. 307 (1971), the Supreme Court held that under certain circumstances a pre-indictment delay could result in a denial of due process guaranteed by the fifth amendment. We applied the *Marion* test in *United States v. Mays,* 549 F.2d 670 (9th Cir. 1977) and held that *Marion* requires that three elements be considered: (1) actual prejudice to defendants, (2) length of delay, and (3) reason for delay. 549 F.2d at 677-78. While the length of delay and the reason for delay are factors to be balanced by the court, a finding of actual prejudice is a prerequisite to finding a due process violation. *See Arnold v. McCarthy,* 556 F.2d 1377, 1382 (9th Cir. 1978); *United States v. Holm,* 550 F.2d 568, 569 (9th Cir.), *cert. denied,* ..... U.S. ..... (1977); *Mays,* 549 F.2d at 677, 680. The Supreme Court in *United States v. Lovasco,* 431 U.S. 783, 789-90 (1977), in an action based on pre-indictment delay, reiterated the necessity of proving actual prejudice in order for an appellant to prevail. The three-prong inquiry outlined in *Mays* is consistent with the Supreme Court's subsequent command in *Lovasco* that "lower courts, in the first instance, [assume] the task of applying the settled principles of due process that [the Supreme Court' has] discussed to the particular circumstances of individual cases." 431 U.S. at 797.

In deciding several motions on this issue, the district court found that no prejudice resulted to appellant from the pre-indictment delay. Appellant has not presented the

"definite" evidence which would persuade us that the district court's finding was clearly erroneous. *See Mays,* 549 F.2d at 677. Since the showing of actual prejudice required by *Mays* and *Lovasco* is lacking, it is unnecessary for us to consider the length of or the reason for the delay.

The judgment of the district court is AFFIRMED.

Office of the Clerk

United States Court of Appeals

For the Ninth Circuit

Notice of Entry of Judgment

Please take notice that the judgment was filed and entered in the case noted on the attached disposition (opinion, memorandum or order). Also, please take special notice of the date of filing as it represents the date of entry of judgment.

Important Time Periods

There are fourteen (14) days from the date of entry of judgment in which to file a petition for rehearing. The mandate of the court shall issue twenty-one (21) days after the entry of judgment unless the court orders otherwise. If the court enters an order denying the petition, the mandate will issue (7) days thereafter. For further information regarding these processes, please refer to Rules 36, 40 and 41 of the Federal Rules of Appellate Procedure.

Appendix C

United States District Court for
Northern District of California

Docket No. CR 74-499-CBR

United States of America

vs.

Dewayne F. Titus,

Defendant.

[Filed July 23, 1976]

In the presence of the attorney for the government the defendant appeared in person on this date—July 21, 1976.

Counsel

[ ] Without Counsel. However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] With Counsel Orrin L. Grover.

Plea

[ ] Guilty, and the court being satisfied that there is a factual basis for the plea.

[ ] Nolo Contendere.

[X] Not Guilty.

Finding & Judgment

There being a finding of

[ ] Not Guilty. Defendant is discharged

[X] Guilty.

Defendant has been convicted as charged of the offense(s) of Violation: Title 26 U.S.C., Section 7201—Income Tax Evasion as charged in counts one (1), three (3) and five (5) of the indictment and Violation: Title 26 U.S.C., Section 7206(1)—Willfully Making and Subscribing False Returns as charged in counts two (2) and four (4) of the indictment.

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Special Conditions of Probation

IT IS ADJUDGED that as to count one (1) of the indictment the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of two (2) years, to pay a fine to the United States in the sum of five thousand ($5,000) dollars and to pay for the costs of the prosecution of this case.

IT IS FURTHER ADJUDGED that as to count two (2) of the indictment the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of two (2) years, to pay a fine to the United States in the sum of one thousand five hundred ($1,500) dollars and to pay for the costs of the prosecution of this case.

IT IS FURTHER ADJUDGED that as to count three (3) of the indictment the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of two (2) years, to pay a fine to the United States in the sum of five thousand ($5,000) dollars and to pay for the costs of the prosecution of this case.

IT IS FURTHER ADJUDGED that as to count four (4) of the indictment the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of two (2) years, to pay a fine to the United States in the sum of one thousand five hundred ($1,500) dollars and to pay for the costs of the prosecution of this case.

IT IS FURTHER ADJUDGED that as to count five (5) of the indictment the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of two (2) years, to pay a fine to the United States in the sum of five thousand ($5,000) dollars and to pay for the costs of the prosecution of this case.

IT IS FURTHER ADJUDGED that the sentence of imprisonment only as to counts two (2), three (3), four (4) and five (5) run concurrent with the sentence of imprisonment this day imposed in count one (1) of the indictment for a total of two (2) years imprisonment. The fines imposed in counts one (1), two (2), three (3), four (4) and five (5) are to be

cumulative for a total fine of eighteen thousand ($18,000) dollars.

IT IS ORDERED that appearance bond filed herein, if any, be and is hereby exonerated.

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by [X] U.S. District Judge

Charles B. Renfrew

/s/ Charles B. Renfrew

Date 7/23/76

Entered in Criminal Docket 7/27/1976

Appendix D

Letter of Elliot Rapaport, M.D. dated May 2, 1975

May 2, 1975
Judge Charles B. Renfrew
U. S. District Court
450 Golden Gate Avenue
San Francisco, California 94102

Re: Mr. DeWayne F. Titus

Dear Judge Renfrew:

In accordance with your request I re-examined Mr. DeWayne F. Titus in my office on April 30, 1975. I have also discussed his condition with his private physician, Dr. Johnson, and reviewed the coronary arteriograms taken last February.

Mr. Titus continues to have complaints more or less identical to those he was experiencing three months ago. He states he continues to have almost nightly chest discomfort which awakens him around 1:00 a.m. from sleep and which, for the most part, is relieved by sublingual Isordil. However, it generally has kept him from falling back to sleep until the early hours of the morning. He denies any paroxysmal nocturnal dyspnea, orthopnea, nocturnal cough, or hemoptysis. Mr. Titus also has continued to have occasional exertional chest pain during the day time hours. These seem typical of angina pectoris and also are promptly relieved either by sublingual nitrites or the cessation of exercise.

Mr. Titus had additional studies under Dr. Johnson's care following his last court appearance. An exercise treadmill test both before and after stopping digoxin was positive with significant, albeit relatively minor, ST segment depression. However, it should be noted that the resting EKG is abnormal. The coronary arteriogram

showed all three grafted vessels are open and functioning, although Dr. Johnson feels there has been some additional occlusive changes in two of the native vessels. Mr. Titus' medical management has resulted in an increase in the amounts of drugs being taken to the point where he is currently taking 80 mg. propranolol, four times per day; 30 mg. Isordil, four times per day; as well as his previous quinidine, aldactoside and digoxin. The patient feels the heavy increase in his medications is responsible for an increase in his general tiredness and easy fatigability. He states he no longer has the energy he formerly had and, in addition, is having some depressive thoughts which have approached at times thoughts of self annihilation. He is worried by his lack of zest and energy and stated at one point in the examination that he doesn't see really how he could last a day in a trial situation. On the other hand, at the end of the examination when I discussed frankly with him the scope of his problem and the nature of the decision I had to reach, he reiterated the thought that he had expressed last January, namely, that he would just as soon get the whole thing over with, and "let's go ahead". He has continued to work 2-3 hours per day and has flown by private plane to various parts of California on business. He continues to smoke an occasional cigar and to drink socially, but denies any excesses in these areas.

Physical examination revealed a well-tanned, somewhat phlegmatic appearing white male who distinctly acted more lethargic and somewhat more depressed than I had seen him previously. Blood pressure, 166/90 (right arm); 160/90 (left arm), recumbent. Pulse is 56.

Examination of the heart today revealed an impalpable apical impulse. There was no parasternal lift. The rhythm is regular. The rate is 56. Sounds are of good quality. S_2 is physiologically split at the apex with no real accentua-

tion today of the pulmonic component. A readily audible S_4 is heard at the apex and left sternal border. There were no murmurs heard.

Lungs are clear to examination and there is no evidence of any increase in central venous pressure or abnormal neck vein pulsations.

The liver edge is not felt and there is no significant peripheral edema.

Electrocardiogram today shows no essential change from the examination of January 29, 1975.

Conclusions and Recommendations

There has been little evidence of any objective or subjective change since the examination of last January. By definition, Mr. Titus is no longer demonstrating so-called "unstable angina", but rather has stabilized with a picture of chronic, relatively disabling angina pectoris. His episodes of daily chest discomfort, as well as his increasing tiredness and fatigability, are present despite the fact that he is receiving optimal medical management with propranolol and Isordil, and despite the fact that coronary arteriography reveals that all three of his vein bypass grafts are patent and seemingly functioning well.

It is unlikely that Mr. Titus' symptoms will change appreciably in the near future. He has had four to five months of essentially the same type of manifestations of his coronary heart disease and there is no reason to expect that there will be any decrease in the frequency or severity of his angina over the next few weeks or months. He is, of course, a candidate for another myocardial infarction at any time, but the stability of his symptoms over the past several months makes this a less hazardous possibility now than it was in January, at least for the immediate near term.

My recommendation as to whether, in his present condition, Mr. Titus is capable of withstanding trial has been a difficult one to reach. There are a number of imponderables, not the least of which is the fact that Mr. Titus is apparently planning to serve as his own lawyer and, thus, may be under even more stress than usual. On the other hand, I want to point out that I observed Mr. Titus for approximately three hours in court at the end of January, and during that period he apparently did not have a single anginal episode, at least not one that caused him to indicate the presence of chest discomfort or to place any medication under his tongue as he normally would have responded.

Another imponderable is my lack of familiarity with the discretion of the court in permitting appropriate recesses and to some extent in catering to Mr. Titus' condition. Thus, I would feel much more relaxed about suggesting that the case go ahead were I assured that sessions would not last for long hours, but perhaps for three or four hours a day, and that the court be prepared to grant Mr. Titus an immediate recess for 10-15 minutes at any time should he begin to experience chest discomfort or other complaints.

In conclusion, if the above is possible I would feel it reasonable to go ahead judiciously. I don't feel that such a course would result in irreparable harm to Mr. Titus. Should he subjectively worsen during the course of the proceedings, I would recommend that the trial be suspended until such time as I could have the opportunity to re-evaluate the situation.

Sincerely yours,

ELLIOT RAPAPORT, M. D.
Professor of Medicine

ER:lf

Appendix E

Letter of Roger B. Johnson, M.D. dated August 5, 1975

[Filed Aug. 12, 1975]

August 5, 1975

The Honorable Charles B. Renfrew, Judge
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

Re: TITUS, DeWayne F.

Dear Judge Renfrew:

The purpose of this letter is (1) to provide the Court with information relative to Mr. Titus' current medical status, and what has taken place since my previous letter of 5-7-75 (see appendix); and (2) to state my opinion regarding Mr. Titus' fitness to stand trial.

As Mr. Titus' physician, it is my sincere opinion that the physical and psychological stress of a trial at this time represents a significant risk of permanent cardiac damage due to myocardial infarction, and the distinct possibility of sudden death in the courtroom due to a cardiac rhythm disturbance. My opinion is based on the following facts from Mr. Titus' medical history:

A. PRESENCE OF SEVERE CORONARY HEART DISEASE. There is no doubt whatsoever that Mr. Titus has severe coronary heart disease. This was proven by arteriography performed prior to surgery. And although coronary bypass surgery may improve patients' symptoms, it does *not* alter the disease process itself. Evidence for severe coronary heart disease can be summarized as follows:

1. Two previous myocardial infarctions. According to the referring physician, his initial infarction took place in 1959, when he was hospitalized for a period of six weeks. I have not reviewed the hospital data from that admission myself. His second myocardial infarction occurred in November 1973. I saw Mr. Titus at that time in consultation at Eden Hospital. There was definite evidence, both by electrocardiogram and serum enzyme studies, of myocardial infarction.

2. Numerous episodes of acute coronary insufficiency (prolonged periods of cardiac pain without evidence of myocardial infarction) which have required hospitalization on nine different occasions.

3. Typical exertional angina pectoris (heart pain) since 1959.

4. Extensive coronary artery obstruction proven by coronary arteriography, first at Stanford in May 1972, and again at Merritt Hospital in Oakland in September 1974. The latter study was performed by me; the arteriograms taken at Stanford were obtained and reviewed by me.

5. Impairment of cardiac function, with poor contractility of the under surface (inferior wall) of the main pumping chamber of the heart demonstrated by angiography. This is the same area that has been shown by electrocardiograms to be the site of previous myocardial infarction.

B. WORSENING SINCE SURGERY. Mr. Titus was completely free of cardiac pain for two months following his coronary bypass surgery in September 1974. On 11-26-74 he had his first episode of cardiac pain since surgery, which occurred after eating lunch.

For the next several months, the frequency and severity of cardiac pain became progressively worse in spite of medical therapy, and he was considered to be in a state of "unstable angina." Although the *frequency* of chest pain episodes has stabilized in recent months, his clinical condition is still worse than it was before surgery. There is both subjective and objective evidence to support this statement:

1. SUBJECTIVE. In his report of 7-30-75, Doctor Rapaport states that "the evaluation of the severity of his problem is for the most part dependent upon his subjective complaints." As physicians, we much prefer to base our evaluation of patients on objective measurements, rather than subjective complaints. But whether we like it or not, we *cannot ignore* the statements made by Mr. Titus to the effect that his chest pain has been getting worse in recent months. Although the frequency of pain remains about the same, he states that the intensity and duration of pain have increased and that it is more difficult to relieve by nitroglycerin or Isordil.

2. OBJECTIVE. Although by physical examination and resting electrocardiogram, there has been no significant change in Mr. Titus since surgery, we do have objective evidence that his coronary circulation has become worse since surgery. In November 1974, when Mr. Titus first developed postoperative cardiac pain, I was concerned that one or more of his bypass grafts might have become occluded. To investigate that possibility, arteriograms were performed on 2-6-75. They demonstrated that none of the by-

pass grafts had become occluded. The study also showed, however, that there were *two new areas* of obstruction in Mr. Titus' own coronary arteries, which were not present on the previous study in September 1974. After having two months during which he was pain free after surgery, Mr. Titus developes a recurrence of cardiac pain; arteriograms are done, and they demonstrate two new areas of coronary obstruction. I find it difficult to reach a conclusion other than: the new areas of obstruction are most likely responsible for the patient's recurrence of pain.

C. ISCHEMIA, STRESS AND THE RISK OF THE TRIAL. Ischemia, in any organ of the body, is a state of imbalance between the organ's need for blood, and the ability of the circulation to deliver that amount of blood. In the case of the heart, the heart's need for blood is determined by the amount of work that it is doing at any particular time. The work of the heart is minimal when one is asleep; heart work is increased, not only during physical exercise, but also with psychological stress, such as fear, anger, anxiety, frustration or worry. The amount of heart work during a period of intense fear, for example, may be as great as that of climbing stairs. In Mr. Titus, we have demonstrated by arteriograms that his coronary arteries have multiple areas of obstruction, some of which have been helped by surgery, but in two areas the situation has become worse. Most of the time, his coronary circulation can deliver enough blood to satisfy his need at rest and with the mild exertion required for daily living. But Mr. Titus appears to be in a rather delicate state of balance. Whenever that balance is upset, by physical exertion, emotional stress, eating a meal, or lying

down at night, he develops ischemia and cardiac pain (angina pectoris).

What happens when the heart is in a state of ischemia? The most common manifestation is angina pectoris, or heart pain. Usually the pain is relieved by a combination of rest and nitroglycerin or similar drugs. During the period of ischemia, however, more serious problems can also occur. The heart becomes much more vulnerable to (1) myocardial infarction, (2) cardiac rhythm disturbances, and (3) heart failure. Myocardial infarction, unlike angina pectoris, is an irreversible process whereby a certain portion of the heart dies and is replaced by scar tissue. During the state of ischemia, serious cardiac rhythm disturbances, notably ventricular tachycardia and ventricular fibrillation, are much more common. Ventricular fibrillation, when it occurs outside the hospital, is usually fatal. Ventricular tachycardia may also be a fatal arrhythmia, or it may terminate spontaneously, with or without circulatory collapse and loss of consciousness. On 6-19-75 Mr. Titus had an episode of cardiac ischemia, followed by rapid palpitation and sudden loss of consciousness. On the basis of the history obtained from Mr. Titus and from Ms. Kolsch the most likely diagnosis is ventricular tachycardia with spontaneous termination. Mr. Titus' decision to complete his shower after he began to experience chest pain was unwise, but he did not realize that at the time. Whether or not a ventricular tachycardia occurred, loss of consciousness in this instance was almost certainly due to a sudden drop in blood pressure. The fact that no permanent cardiac damage occurred was a stroke of good fortune for Mr. Titus. When a patient with severe coronary heart disease suffers a sudden fall in blood pressure, sufficient to cause loss of consciousness, the likelihood of permanent cardiac damage or sudden death is high. Clearly, Mr. Titus should not have taken the shower. His problem at the time was

cardiac ischemia, aggravated by showering (vasodilatation and hypotension) and resulting in a potentially fatal arrhythmia. Mr. Titus is obviously not going to take a shower in court. But the end result could be the same as if he did. The stress of the trial, by producing myocardial ischemia, might well lead to a ventricular tachycardia, loss of consciousness and even death.

In summary:

1. Mr. Titus has extensive coronary heart disease, which has been proven by arteriography.

2. His condition has worsened significantly since his operation; this has been demonstrated not only by an increase in subjective symptoms, but also by objective evidence: two new areas of obstruction in his coronary circulation.

3. The episode of 6-19-75 was due to myocardial ischemia, most likely resulting in a ventricular tachycardia, which is a potentially fatal rhythm disturbance.

4. Myocardial ischemia, and its potential for serious complications, may occur with emotional stress just as well as with physical exertion.

5. The level of emotional stress during this trial will be high, regardless of how short the individual sessions may be, or how many recesses are granted Mr. Titus.

Because of my concern for the health and well-being of my patient, and for the reasons outlined above, *I am convinced that the stress of this trial represents a significant danger to his health and to his life.*

Sincerely yours,

Roger B. Johnson, M.D.

RBJ/rd

Appendix: Interval Medical History and Current Status

Since my previous letter of 5-7-75, Mr. Titus has been seen in the office at approximately monthly intervals. There has been no major change in his physical findings or electrocardiogram.

On 6-19-75, Mr. Titus was hospitalized following a syncopal episode. He had been unusually tired that day, but had not experienced any more angina than usual. At about 6:00 p.m. he ate a light supper. He had no chest discomfort during the meal or immediately thereafter. He then went to take a shower, a part of his daily ritual. After turning on the water and adjusting the temperature, he developed mild substernal discomfort. He took a nitroglycerin tablet and one sublinqual Isordil tablet, and then stepped into the shower believing that the mild discomfort in the chest would subside, as it usually does, within a few minutes after the sublingual medication. His showers are brief and non-strenuous (he has been advised against taking vigorous showers). His chest discomfort gradually became worse. He then stepped out of the shower, found no towel available, and called to Ms. Kolsch, asking her to bring him one. At that point there was a sudden change. He became aware of rapid, regular palpitations, which he could see over the left anterior chest wall. His substernal discomfort became abruptly worse and quite severe, he developed severe dizziness, and then passed out, falling to the floor. Ms. Kolsch (who is a well trained intensive care nurse) arrived to find him lying supine on the floor, limp and unresponsive to verbal stimulation. She noted that his color was good, and that his skin was warm and dry. She checked his pupils with a flashlight, and found them briskly reactive. His eyes were open, but he did not respond to her in any way. She brought the oxygen tank to him, and mask oxygen was started. She then listened to his heart and noted a very irregular heart beat, which was not rapid;

during the time that she listened, the irregularity suddenly stopped, and his heart beat became regular at a rate of 64 per minute. Blood pressure was 130/80. She also noted an involuntary tremor of the right arm and forearm, which continued for the next 10 minutes; there were no actual clonic jerks to indicate a grand mal seizure. From the findings of unresponsiveness and tremor, Ms. Kolsch suspected that he might have had a stroke. About 10 minutes after he had fallen, he began to respond to verbal stimulation, and was able to move his hands and feet on command. He answered questions appropriately, and stated that he was still having chest pain. The tremor finally subsided. It should be mentioned that Mr. Titus does not have any recollection of this phase of the acute episode, and recalls only that he awakened in the ambulance, still having chest pain. He was taken to Washington Hospital in Fremont by ambulance, and was seen and examined in the emergency room. Blood pressure on arrival (9:30 p.m.) was 160/98, pulse was 68 and regular. An electrocardiogram was taken. At approximately 10:00 p.m. I received a telephone call from the emergency room physician, and he described his findings. Neurologic examination showed generalized weakness, but no focal signs that might indicate a stroke. The physician described the electrocardiogram to me on the phone. In order to determine whether any cardiac damage had taken place, however, it would have been necessary to compare the electrocardiogram with his previous electrocardiograms, something that could obviously not be done on the telephone. From the history that the physician related to me, I was concerned about the possibility that an acute myocardial infarction had taken place, resulting in an acute rhythm disturbance and loss of consciousness. I did not feel that it was wise or safe to transfer Mr. Titus at that time to Merritt Hospital under my care. I was told that Doctor Edward Whalen was on call and would see Mr. Titus; Doctor Whalen practices

internal medical and cardiology in Fremont. I suggested to the emergency room physician that Doctor Whalen telephone me when he arrived at the hospital, so that I might summarize Mr. Titus' case for him. I went back to sleep, and did not hear from Doctor Whalen. I attempted to contact Doctor Whalen by telephone the following day, but was not successful. The following day I telephoned Ms. Kolsch, who brought me up to date regarding the events in the hospital. I later obtained copies of the admission and discharge summaries from Washington Hospital. Serial electrocardiograms showed no significant change, and blood enzyme studies were normal, excluding the diagnosis of myocardial infarction. The dosage of both digoxin and propranolol was reduced by one-half, because of his slow resting heart rate, although blood digoxin level was within the therapeutic range. Continuous ECG monitoring was carried out, which showed occasional atrial premature beats. He had two moderately severe episodes of chest pain in the hospital, one while walking to his room; the other awakened him from sleep about 5:00 a.m., lasting 30 minutes.

It should be mentioned that during his entire life, Mr. Titus has had only three episodes of syncope (loss of consciousness): (1) In August 1973, he developed severe cardiac pain (angina pectoris) while eating a meal, and then passed out. He was admitted to Saint Rose Hospital in Hayward, where electrocardiograms and blood studies failed to show evidence of myocardial infarction. He was discharged after six days with a diagnosis of acute coronary insufficiency. (2) in November 1973 he was admitted to Eden Hospital with atrial fibrillation and a rapid, irregular heart beat. He was placed in the coronary care unit, and treated with an intravenous digitalis preparation. During treatment, he had an episode of ventricular fibrillation ("cardiac arrest") with immediate loss of consciousness, which

required prompt treatment by electric shock to restore normal rhythm. (3) The most recent episode on 6-19-75 has been described above. Of the three episodes, one (#2) has been documented by electrocardiogram to be ventricular fibrillation. The other two occurred outside the hospital, and we do not know the exact cause.

Mr. Titus was seen in the office on 7-1-75, three days after his discharge from Washington Hospital. He had been discharged on Inderal (propranolol) 160 mg daily, which is half of his usual dose, and oral Isordil had been discontinued. During the three days since his discharge, with virtually no physical activity, he was having more angina attacks than usual, possibly because of the change in medication. Blood pressure was 120/60, pulse was 68 and regular. Physical findings were otherwise unchanged. His electrocardiogram was unchanged from the previous tracings prior to his hospitalization. Because of the increase in angina attacks with comparable activity, his previous medication regimen was resumed by increasing his Inderal and restarting the oral Isordil.

Since 7-1-75, the frequency of angina attacks has returned to approximately the same level as I described in May, i.e. about 10-12 episodes per 24 hours, half of which occur at night. Angina during the day is related to meals, emotional stress or physical activity. Although the frequency of pain is about the same, Mr. Titus feels that with each episode, the pain is more intense, of longer duration, and is less predictably relieved by nitroglycerin and/or sublingual Isordil.

Mr. Titus is able to control the number of angina attacks during the day by simply altering his physical activity. He has been unable to alter the frequency of chest pain at night, however. He usually retires about 8:30 p.m., and watches television for an hour or longer. Within an hour after retiring, he developes a feeling of "clos-

ing in" in the upper substernal area, with radiation to both shoulders, both arms, and producing a tingling sensation in the fingers of both hands. He becomes short of breath. To relieve the discomfort, he sits up, uses oxygen, takes nitroglycerin and sublingual Isordil (one of each) 2-3 times before he obtains relief of pain. His shortness of breath usually subsides at the same time and he does not develop headaches as a result of the medication. There is no associated belching, feeling of indigestion, or lower substernal discomfort. Once the pain is relieved, he falls asleep, but is usually awakened one or more times in the early morning hours with the same type of discomfort, for which he obtains relief in a similar fashion.

Mr. Titus first began having this type of nocturnal chest discomfort in late December 1974. After an unusually severe episode he was admitted to Eden Hospital, but electrocardiograms and serum enzyme studies showed no evidence of myocardial infarction. I saw him in the office on 1-6-75. At that time, his description of chest pain at night was quite different. There was no radiation of the pain into the shoulders or arms, and it was consistently associated with belching, although belching would not relieve the pain. An upper gastrointestinal series was obtained on 1-7-75, and showed a small hiatus hernia, without evidence of esophagitis. There was no abnormality of the stomach or duodenum. On the possibility that his nocturnal chest pain was not cardiac in origin, but due instead to his hiatus hernia, he was given a trial of antacid therapy at bedtime, which was ineffective. Bed elevation was also tried, during his February 1975 hospitalization, and did not alter his pain. Since that time, the pattern of nocturnal pain has changed; belching is no longer present, and the radiation of pain into the shoulders and arms, with tingling of the fingertips, is much more suggestive of cardiac pain.

Considering the history of upper substernal pain and shortness of breath, occurring within an hour after retiring, the possibility of mild congestive heart failure due to recumbency was considered. Aldactazide (a diuretic) has been continued, therefore, to reduce his fluid volume, and in an attempt to reduce the number of nocturnal pain episodes, but this has not been successful.

SUMMARY: Mr. Titus continues to have angina pectoris during the day, precipitated by exertion, meals or emotional stress. His nocturnal chest pain episodes also have continued. Although he does have a small hiatus hernia, the quality of his chest pain is more suggestive of a cardiac source. The frequency of both type of pain is about the same. But compared to May 1975, Mr. Titus states that his pain is now more intense, lasts longer, and is less predictably relieved by oxygen and sublingual medication.

CURRENT MEDICATIONS:

1. Digoxin 0.25 mg once daily.
2. Quinidine sulfate 200 mg four times daily.
3. Isordil (oral) 30 mg four times daily.
4. Meprobamate 400 mg, 2-3 at bedtime, total of 4-5 in a 24 hour period. Takes an additional 1-2 tablets before situations likely to produce stress, such as board meetings and courtroom appearances.
5. Aldactazide 1 twice daily. The purpose of this medication is to reduce the body fluid content, and thus to prevent congestion of the lungs at night.
6. Nitroglycerin 0.4 mg as needed for chest pain. Average 10 per day.
7. Isordil (sublingual) 5 mg as needed for chest pain. Average 10 per day.

8. Oxygen as needed for chest pain and shortness of breath, usually at night.

9. Diet: Low saturated fat, low sodium, bland. Light meals have been recommended, because of the consistent development of angina pectoris after large meals.

ROGER B. JOHNSON, M.D.

RBJ/rd

Appendix F

In the United States District Court
For the Northern District of California

Before: The Honorable CHARLES B. RENFREW, Judge

No. C-74-499 CBR

United States of America,
Plaintiff,

vs.

DeWayne F. Titus,
Defendant.

REPORTER'S TRANSCRIPT

WEDNESDAY, JULY 21, 1976

[Partial transcript: Including the complete testimony of Leonard Karpman, M.D.]

Reported by:

MONICA L. ENDSLEY, CSR #3257

MR. KARPMAN: K-a-r-p-m-a-n.

THE CLERK: K-a-r-p—

MR. KARPMAN: P as in Peter.

THE CLERK: Thank you. And your occupation?

MR. KARPMAN: I'm a cardiologist.

THE CLERK: Thank you.

LEONARD SAMUEL KARPMAN,
called as a witness by the Defendant, being
first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. SEAGAL:

Q. Dr. Karpman, may I ask by whom you are presently employed?

A. Permanente Medical Center.

Q. Is that better known as Kaiser Medical Center?

A. Yes.

Q. And what is your medical education, please?

A. I was a graduate of the State University of New York.

Q. In what year?

A. In 1965. I took an internship at residency Kaiser Foundation Hospital in San Francisco. Did a fellowship in cardiology at the Pacific Medical Center Presbyterian Hospital. You want my professional activities beyond that?

Q. Before you go into that, Doctor Karpman, are you Board certified in any particular area?

A. Internal medicine.

Q. And you say internal medicine with any specific specialty in that regard?

A. I am a cardiologist and I'm Board qualified. I'm Subspecialty of Cardiology.

Q. Would you please state your professional associates and professional activities?

A. Well, I'm a member of the Local Heart Association. Assistant Professor of Medical at the University of California. I'm consultant to the Veterans Hospital in cardiology. I'm on the teaching staff of cardiology at Presby-

terian Hospital and the Director Designate of the new Cardiac Catheterization Laboratory for Northern California Kaiser region. I think that's it right there.

Q. And Dr. Karpman—

A. And I'm—well, excuse me,—I'm staff cardiologist where I work, Permanente Medical Group.

Q. And may I ask, Dr. Karpman, have you had any occasions to publish any articles in the field of internal medicine and particularly in regard to cardiological problems?

A. In cardiology I've published an article in internal medicine. Outside of cardiology, no I haven't.

Q. Are you licensed to practice medicine in the State of California?

A. Yes.

Q. And how long have you been so licensed?

A. Eleven years.

MR. SEAGAL: Your Honor, please. Mr. Youngquist, do you have any questions in regard to Dr. Karpman's qualifications?

MR. YOUNGQUIST: Your Honor, I don't understand this adversary proceeding with respect to qualifications.

MR. SEAGAL: I beg your pardon?

THE COURT: You may proceed.

MR. SEAGAL: Your Honor, at this time we're offering Dr. Karpman as a cardiologist—as an expert cardiologist.

THE COURT: I will receive his testimony. You may proceed.

MR. SEAGAL: Q. Dr. Karpman, did you have an occasion to examine DeWayne Titus, the man seated at counsel's table to our rear?

MR. GROVER: Let the record reflect the defendant had to leave the courtroom to take medicine.

MR. SEAGAL: And, as a matter of fact, your Honor, please, with the leave of the Court, I would prefer to conduct this examination of Dr. Karpman which really essentially deals with the medical condition presently of Mr. Titus without him being present. I want to represent to the Court that I advised Mr. Titus I intended to do this matter—has been discussed together with Dr. Karpman, Mr. Titus himself, Mr. Grover. He understands the nature of the testimony will be a somewhat explicit description of his present medical condition and his prognosis. And for reasons that will become clear, perhaps shortly in Dr. Karpman's testimony, he would prefer to not be personally present to hear that testimony. So, if I may proceed without him being present, your Honor, I would like to do so at this time.

MR. YOUNGQUIST: Your Honor, may I ask the Court to inquire of Mr. Seagal is that why Mr. Titus has left the Court, or are we—or was this prearranged? Or are we now in a situation where counsel has waived his presence for these proceedings which I'm perfectly happy to stipulate.

MR. GROVER: Your Honor, Mr. Titus left the courtroom to take medication. We would ask he be permitted to leave the courtroom. He didn't leave the courtroom under any prearrangements with counsel.

THE COURT: I just understood Mr. Seagal to say—

MR. GROVER: We had discussed with him and he had indicated a preference, when we got beyond the qualifications of Dr. Karpman, to leave the courtroom.

THE COURT: And I believe you're waiving the defendant's rights to be present?

MR. SEAGAL: Yes, your Honor.

THE COURT: And you have discussed this with him?

MR. SEAGAL: Yes, explicit, your Honor.

THE COURT: And he's agreeable with it?

MR. SEAGAL: Yes, and just let me make sure his leaving taking medication was not part of the understanding. I would suggest to the Court that he's taking whatever physical needs he has for it, but we didn't intend under any circumstances to have him excused from the Court without the Court's permission.

THE COURT: All right.

MR. SEAGAL: Q. Dr. Karpman, I started to ask you had you or have you examined DeWayne Titus?

A. Yes, I have.

Q. And under what circumstances did you come to examine Mr. Titus?

A. Well, I was contacted by you and told in essence that Mr. Titus was convicted of a crime, and was facing a potential prison sentence. And it was your wish that I evaluate him primarily in consideration of whether or not he could survive prison.

Q. Now, in regard to that inquiry that I put to you and that request for examination, what, if anything, did you do?

A. Well, I obtained both volumes, very large volumes I may add, of his medical record, reviewed them in detail, examined Mr. Titus and I obtained—coronary arteriograms that were performed in Merritt Hospital that gave representation of the severity of his coronary artery disease.

Q. Now, in addition to those three matters, did you have occasion to talk to any physician who has treated Mr. Titus in the past?

A. Yes, I did. I called Dr. Roger Johnson who is his regular physician, but only in regard to the advisability of performing additional tests.

Q. All right. Before I asked you Doctor, did you or did you know Dr. Johnson prior to your speaking to him about the test you had in mind?

A. No.

Q. Did you ever have any contact with him whatsoever?

A. No.

Q. As far as you know, did he know you; is he familiar to you?

A. We remarked over the phone how strange it was that neither of us had heard of each other.

Q. Did your conversation with Dr. Johnson, of what he happened to say to you, in any way influence your ultimate judgment in regard to Mr. Titus' condition, and the question I put to you?

A. No.

Q. Now—

THE COURT: Did you talk to Dr. Elliot Rapoport?

THE WITNESS: No.

THE COURT: Have you heard about him?

THE WITNESS: Yes, I have.

THE COURT: Is he well thought of in his profession?

THE WITNESS: Yes, he is.

THE COURT: Does he have an outstanding reputation?

THE WITNESS: Yes, fine reputation. He also has the reputation of being inaccessible by telephone.

MR. SEAGAL. Q. While we're on the subject of Dr. Rapoport, did you have the benefit of an earlier written letter report by Dr. Rapoport in connection with the examination of Mr. Titus?

A. Yes, I did.

Q. Now, you indicated that you spoke to Dr. Johnson at least in the subject of tests. When you say a test what are you referring to? What test did you have in mind?

A. Well, specifically there is—there are different forms of stress tests to see how someone responds to stress, how their heart indeed responds to stress. There's a standard exercise test that he had had done previously, but I considered the answer to your question, could he survive stress of, for example, prison. Needing additional information, could he withstand the emotional psychological stress of a change in his routine, forced inter-reactions with people other than those picked by him, et cetera, et cetera. So, I decided a test to fit the situation. The nature of the test is simply basically the same as the physical stress test. You attach a recording device and measure the action of the heart in the areas that you would if you were to have somebody walk on a treadmill. And my plan then, was to become hostile, abusive, and encourage anger, and to look specifically for one of three increments, chest pain, arrhythemia, or distinct pathological changes on the recording system.

Q. Let me ask if I may, Doctor Karpman, let me ask when you say you had planned to become angry and introduce some emotional stress, will this be done with or without Mr. Titus' prior knowledge that this was going to happen?

A. Well, unfortunately a big problem is that it can't be with the total informed consent, or it won't work. If I say I'm going to call you a name and see how angry you get, and then call you a name—

Q. It is my understanding this would have been done without forewarning as to the stress you were going to introduce by abusive or forceful conversation or verbal attacks on that.

A. (The witness nods head.)

Q. You have to say yes or no.

A. Yes.

Q. Now, was anything done by you in regard to having Mr. Titus subjected to this psychological stress test?

A. Well, before I subjected him to the test, I needed to take into account two factors. I decided on the test after reviewing his records prior to examining him. I needed some evaluation of the amount, the magnitude of response I might anticipate, and appraisal how dangerous to his very survival such a response might be.

I based the information, one, on my subsequent interview with him, and prior to the interview a discussion of Dr. Johnson. I asked him what the likelihood would be, for example, that this would induce cardiac arrest, a heart attack, or demise, and in terms of the amount of information it would offer. It was Dr. Johnson's feeling that the test was inappropriately dangerous. That indeed Mr. Titus had so little cardiac reserve and was such an overreactor to stress a potential overreactor to stress, that it might lead him to an end.

Q. And did you agree or does agree with Dr. Johnson's conclusion that in effect, Mr. Titus could not be subjected to psychological stress tests because he's likely to drop dead on it?

A. At the time I spoke to Dr. Johnson, I respected his opinion. However, I felt I would reserve my final judgment until such time as I probed in an interview with Mr. Titus as to how he responds to stress in general.

Q. And did you have an opportunity to interview Mr. Titus subject to your conversation with Dr. Johnson?

A. Yes, I did.

Q. Now, what, if anything, did you do—What, if anything, did you conclude about whether he was amendable to psychological stress test without introducing serious danger of cardiac arrest or severe cardiac problems?

A. Well, I concluded that it would be inviting problems to do it, except perhaps, in the confines of intensive care or coronary care unit with all the resuscitation equipment available.

He portrayed himself to me with no knowledge of why I was asking him the question he's voluble person with very short views. He described in particular, the things that angered him, and how he responded to anger. And just telling me about previous anger, he took a nitroglycerin as he was doing here during particular—particular tense interchanges over the last half hour. He took a nitroglycerin to correspond to the tension in every instance.

So, it was my evaluation that given what I considered the solidarity of evidence already in his files as to the nature and severity of the disease and horror of his prognosis, that the additional information of how he responded to this test would not be worth risking his well-being to perform.

Q. All right. Did you find anything in your reevaluation of these records, the angiograms, your own personal examination, to indicate that the severity of Mr. Titus' illness has been aggravated by Dr. Johnson or by Mr. Titus himself?

A. No, I didn't.

Q. May I ask, can you in any way indicate to the Court what is Mr. Titus' prognosis to survive?

A. He's already exceeded it, Mr. Seagal.

Q. I'm sorry. You said he's already succeeded?

A. The actuary possibility of survival for the magnitude of the disease he's had in the length of time he had his disease, if we were statisticians rather than physicians and human beings, his point on that graph has already passed. His prognosis is dismal. The severity of his disease by all parameters is so severe it would be very incompatible with life. Whether or not he goes anywhere, his likelihood of surviving very long is not very great. If you wish further assessment I think that anything at all if that were to change his very precisely ordered and protected environment with the incredible focal tree of maximum dosage medicine that he's on, any stress would be a physical or emotional—is at considerable risk to do him in. That's as plain as I can state it.

Q. Let's assume, if I may, and ask you—and you assume with me—that Mr. Titus was committed to a prison or prison like institution. And let's assume he was given no physical work to do and permitted a regime within the prison which essentially permitted him to take all the medicines that he's required to take when he's required to take it. Would that not adequately give him as much protection as a person with his health condition could reasonably expect?

A. In one specter yes. In the specter of his physical stress. In the specter of emotional stress which can be as lethal, dead is dead. I don't know that I can say categorically one way or the other. I would have expected that particularly, having come to know Mr. Titus, that there would be no possible way to protect him against all psychological stresses.

Q. May I ask you to now indicate to us that I'm going to point out, perhaps, a number of possible matters that could arise. Would any of these matters—could produce the kind of psychological stress in prison that might have a serious potential—I mean specifically now, serious potential for bringing on a severe cardiac illness to Mr. Titus? Would you say a disturbance in the prison, that is inmate disturbance of any substantial portions, have any potential in this regard?

A. Potential is rather a femoral thing. I can only say even a slight upset, a draft, an unkind word, I don't mean to sound melodramatic, but sure, if there were riots and fires, of course that would give him palpitations. He doesn't have the cardiac reserve if somebody took it upon themselves to vent anger of any kind, to be threatening anything in any way to even be disrespectful within the confines of his personality—

Q. And you say within the confines of his personality, I assume you mean in considering the severity of his cardiac condition?

A. Yes.

Q. As opposed to yourself and mind and anybody else?

A. Absolutely, it is not the magnitude of stress, it is the magnitude of stress versus the amount of cardiac reserve to accommodate that stress to accommodate increased outpouring of the adrenalin-like substance that raised the demands of the heart for oxygen at that particular moment.

Q. Will you place in the same category as producing serious stress or stress that you would be concerned about seriously as a doctor, say verbal abuse from other inmates in an institute—this prison?

A. From the insights that I've gotten from him, number one.

Q. Number one as potential?

A. Magnitude of upsets and potential harmful effects.

Q. Would verbal language which you might consider verbal disrespect, say from guards or prison administrative personality ordering him or directing him to do certain things, how would that rate in terms of potential for producing serious cardiac problems?

A. From elderly people he might consider them laughable. From younger people he would fly into a rage. That's the kind of way he protrayed himself to me.

THE COURT: Let me ask you finally, Doctor, is this what he told you?

THE WITNESS: I didn't ask him if you were in prison and a guard asked you this. I just, you know, I tried to get him to understand that things that angered him and circumstances that angered him in broad generality.

THE COURT: But I understand this is the way he protrayed, that is, he told you if they were older he might laugh at them. If there were younger he'd fly into a rage. He told you that?

THE WITNESS: Yeah, he's particularly sensitive in a few areas. One is younger people who don't take proper heed of the dignities of his years, who are capricious and arbitrary, who are authoritarian and they have not the right to be authoritarian.

THE COURT: In his view?

THE WITNESS: In his view as perceived by him, and I didn't introduce the topic of prison or guard but woefully that's a very—whether it is justified or not, a prison guard.

MR. SEAGAL: Q. Dr. Karpman, are we perhaps in a position of Mr. Titus' case of being possibly mislead as to the seriousness and psychological stress that would affect him because you have to rely on things he tells you about himself or reactions? Could he be malingering or exacting his condition in the likelihood that he's going to be seriously endangered by psychological stress?

A. Well, if there's a possibility that a small portion of this can be, for the sake of the Court—

Q. Yes, how small?

A. Minuscule. This man underwent open heart surgery prior to that indictment. He suffered through three defibrillations, cardiac resuscitation, infarctions, numerable hospitalizations. He watched six of his seven brothers die prematurely. And to do all of this in the stage of malingering, how one would do it is beyond the scope of my imagination.

Do I think he's severely ill as his symptoms describe? Frankly, I'm surprised that he's not more symptomatic and I marvel at the care he's gotten that he has survived this long.

Q. And as a final matter, Dr. Karpman, what do you consider the prognosis and best judgment you could make for Mr. Titus' survival if he is imprisoned as opposed to the prognosis that he may have if he is at large in society, and the environment that he has been living up to now?

A. It is totally unknown. All I can say is his reserve, his cardiac reserve is so close to being zero that anything that at this point would upset his protective well-ordered life, being it having to move to the next building. I can't really prognosticate on his future, because as I said, statistically, he doesn't have one. I can only say that it would seem much more likely that given additional

stresses, he will survive much longer and long in my crystal ball is short.

MR. SEAGAL: I have no further questions at this time, your Honor.

THE COURT: Any questions?

MR. YOUNGQUIST: Well, your Honor, as I said, I don't consider this an adversary proceeding. The record should show that the Government does not have access to the medical reports on part of the present report. I have really no bases to cross-examine Mr. Karpman. I would suggest possibly the Court ask a few questions.

THE COURT: I take it that you read the letter of both Dr. Johnson and Dr. Rapoport; is that correct?

THE WITNESS: Well, I read the last letter of Dr. Rapoport which in explicit—within which as that there was at least one brief letter. No, I didn't read that.

THE COURT: You didn't read all of his letters?

THE WITNESS: No, I didn't read all his letters.

THE COURT: Did you take efforts to contact Dr. Rapoport despite his reputation?

THE WITNESS: I didn't make an effort to contact Dr. Johnson or Dr. Rapoport in terms of how they saw this case. I didn't really think, you know, I was to evaluate them. I really thought what Mr. Seagal asked me to do was to observe a patient with a problem vis-a-vis. A single potential change in his life-style, and to remain as objective as I might. I didn't do anything except review the record as they existed.

THE COURT: And did you put one question to Dr. Johnson whether you could subject stress test?

THE WITNESS: Because at this point—

THE COURT: Did you believe that you had subjected him to a stress test?

THE WITNESS: Oh, no, I didn't.

THE COURT: You did not?

THE WITNESS: No, I did not.

THE COURT: And so the question you put to him, you did not consider to be a stress test thing?

THE WITNESS: The question I put to Mr. Titus?

THE COURT: The question you put to Mr. Titus.

THE WITNESS: No, it was in the course of relaxed, free, open conversation.

THE COURT: And my understanding is that Dr. Johnson, who felt that this stress test would be inappropriately dangerous concluded that the defendant would be able to survive in prison? Is that your understanding of his letter?

THE WITNESS: Well, frankly no. That's not my understanding of his letter. I know the conclusions and I—right after you read them, I have the file back there. I reread those same passages. I was reading, you know, the exact, for example, that Dr. Johnson feared of separating him from his fiancee who is a trained specially trained nurse who administered all his drugs. I was more impressed, for example, with the assessment of Dr. Johnson that Mr. Titus would be unable to take over those morals that she has applied on his behalf. And I also read letters that said categorically that from Dr. Johnson that he didn't think that Mr. Titus medically was capable of standing trial, let alone going to prison. So, I missed the letter of conclusion number two out of three or whatever it is.

THE COURT: All right, thank you, Doctor.

MR. SEAGAL: Might I ask Dr. Karpman one matter regarding the question your Honor asked?

THE COURT: Sure.

MR. SEAGAL: Doctor Karpman, since Mr. Titus has already been through a trial, I suppose we have some standards to see what he can handle in part through the psychological tests and physical stress. In your judgment, does the imprisonment, does that have more potential for stress, the same amount of stress, or lesser potential of stress than when Mr. Titus attended the trial and before this Court under the circumstances of which it is conducted?

THE WITNESS: I really can't say. All I can say is that to evaluate how he withstood the prior stress that, number one, he survived. Does that mean that he wasn't sick? No, he was damn lucky. He fell over flat on his nose I was told at one point during the trial, and going over three other times when he had—when he had suddenly a loss of consciousness without warning during one time. He was in ventricular fibrillation, and he had to be shocked, hit in the head with electricity to keep him from dying three times. And at least one other occasion he had documented rhythm disturbance with his heart. So, I think it was attributed to good form and maximum medication that he survived the trial.

As to whether going to prison will constitute a greater stress, your only input, unfortunately, of Mr. Titus, is whether he lives or dies, and it's a hell of a way to prove a point.

MR. SEAGAL: I have no further argument, your Honor.

THE COURT: Thank you, Dr. Karpman. You may be excused.

MR. GROVER: Your Honor, could we bring the defendant back.?

THE COURT: Surely.

MR. YOUNGQUIST: Your Honor, I had asked counsel if that's all he has to present by way of testimony?

MR. GROVER: That's all in the way we have to present by way of testimony.

THE COURT: Would you like to be heard now?

MR. GROVER: Yes, your Honor.

THE COURT: Surely.

MR. GROVER: Your Honor, the question before the Court is whether to sentence Mr. Titus to prison and what exactly is the appropriate sentence of him. We've heard testimony of Dr. Karpman and, of course, had the opportunity to read the presentence report. I think it's pretty clear.

THE COURT: Has counsel had the opportunity to read the presentence report?

MR. GROVER: Yes, your Honor, it's clear that from the testimony—that from the testimony of Dr. Karpman and also from the prior testimony of Dr. Johnson before this . . . .

Appendix G

United States District Court
Northern District of California

No. CR-74-499-CBR

United States of America,
Plaintiff,

vs.

DeWayne F. Titus,
Defendant.

SPECIAL AND GENERAL FINDINGS

[Filed May 17, 1976]

Since closing arguments the Court has read all of the available reporter's transcript of the trial herein and where no transcript was available re-read its trial notes. The Court has also reviewed each of the exhibits received in evidence, both those offered by the Government and those offered by the defendant DeWayne F. Titus. Based upon its review and all of the evidence adduced at trial and the arguments of John Youngquist, Esq., counsel for the Government, defendant DeWayne F. Titus, and Stephen Tamchin, Esq., defendant's legal advisor, the Court makes the following Special and General Findings.

SPECIAL FINDINGS

FIRST COUNT

1. A substantial additional amount of federal income taxes was due and owing from defendant DeWayne F. Titus for the calendar year 1967 over and above the amount

of taxes which was declared on defendant's joint income tax return for that calendar year.

2. Defendant DeWayne F. Titus had knowledge that some additional federal income taxes of a substantial amount was due and owing from him to the Government for the calendar year 1967 over and above the amount of taxes which was declared or disclosed in his joint income tax return for that year.

3. Defendant DeWayne F. Titus willfully attempted to evade or defeat such additional federal income taxes with the specific intent to defraud the Government of such additional taxes.

4. Defendant DeWayne F. Titus did not prepare the tax return in question which was prepared for him by Robert Greer who held himself out as being qualified to prepare income tax returns for others.

5. Defendant DeWayne F. Titus did not povide full and complete information to Robert Greer and knew that the return as prepared by Mr. Greer was not correct and substantially understated the tax liability of defendant and his wife, Mildred M. Titus, in that defendant failed to report all of the proceeds from his sales of shares of stock in the Dymo Company in that calendar year.

SECOND COUNT

1. Defendant DeWayne F. Titus caused to be filed a joint income tax return for the calendar year 1967 in his name and in the name of his wife, Mildred M. Titus, which was not true and correct as to every material matter in that he had failed to report the total proceeds from the sales of shares of stock in the Dymo Company in that calendar year.

2. Defendant DeWayne F. Titus caused the income tax return in question to be filed knowing that it was false as noted above.

3. Defendant DeWayne F. Titus did cause the return to be filed willfully with the specific intent to defraud the Government of additional taxes which were due and owing.

THIRD COUNT

1. A substantial additional amount of federal income taxes was due and owing from defendant DeWayne F. Titus for the calendar year 1968 over and above the amount of taxes which was declared on defendant's joint income tax return for that calendar year.

2. Defendant DeWayne F. Titus had knowledge that some additional federal income taxes of a substantial amount was due and owing from him to the Government for the calendar year 1968 over and above the amount of taxes which was declared or disclosed in his joint income tax return for that year.

3. Defendant DeWayne F. Titus willfully attempted to evade or defeat such additional federal income taxes with the specific intent to defraud the Government of such additional taxes.

4. Defendant DeWayne F. Titus did not prepare the tax return in question which was prepared for him by Robert Greer who held himself out as being qualified to prepare income tax returns for others.

5. Defendant DeWayne F. Titus knew that the return as prepared by Mr. Greer was not correct and substantially understated the tax liability of defendant and his wife, Mildred M. Titus, in that it failed to report the rental income from Ziegler Steel Company which defendant received during that calendar year.

FOURTH COUNT

1. Defendant DeWayne F. Titus caused to be filed a joint income tax return for the calendar year 1968 in his name and in the name of his wife, Mildred M. Titus, which was not true and correct as to every material matter in that he had received rental income from Ziegler Steel Company during the calendar year which were not reported and that he reported an installment sale of property on October 18, 1968, for a sales price of $1,175,000 whereas he well knew and believed that he had made on such installment sale on October 18, 1968, or any other time during that calendar year in the amount of $1,175,000 or any other amount.

2. Defendant DeWayne F. Titus caused the income tax return in question to be filed knowing that it was false as noted above.

3. Defendant DeWayne F. Titus did cause the return to be filed willfully with the specific intent to defraud the Government of additional taxes which were due and owing.

FIFTH COUNT

1. A substantial additional amount of federal income taxes was due and owing from defendant DeWayne F. Titus for the calendar year 1969 over and above the amount of taxes which was declared on defendant's income tax return for that calendar year.

2. Defendant DeWayne F. Titus had knowledge that some additional federal income taxes of a substantial amount was due and owing from him to the Government for the calendar year 1969 over and above the amount of taxes which was declared or disclosed in his income tax return for that year.

3. Defendant DeWayne F. Titus willfully attempted to evade or defeat such additional federal income taxes with

the specific intent to defraud the Government of such additional taxes.

4. Defendant DeWayne F. Titus did not prepare the tax return in question which was prepared for him by Richard Thomas who held himself out as being qualified to prepare income tax returns for others.

5. Defendant DeWayne F. Titus knew that the return as prepared by Mr. Thomas was not correct and substantially understated the tax liability of defendant in that it failed to report the proceeds realized by him from the sale of twenty acres of land owned by him as his separate property.

GENERAL FINDINGS

1. The Court finds defendant DeWayne F. Titus is guilty of income tax evasion in violation of § 7201 of Title 26 of the United States Code as charged in the First Count of the Indictment herein.

2. The Court finds defendant DeWayne F. Titus is guilty of willfully making and subscribing a false return in violation of § 7206(1) of Title 26 of the United States Code as charged in the Second Count of the Indictment herein.

3. The Court finds defendant DeWayne F. Titus is guilty of income tax evasion in violation of § 7201 of Title 26 of the United States Code as charged in the Third Count of the Indictment herein.

4. The Court finds defendant DeWayne F. Titus is guilty of willfully making and subscribing a false return in violation of § 7206(1) of Title 26 of the United States Code as charged in the Fourth Count of the Indictment herein.

5. The Court finds defendant DeWayne F. Titus is guilty of income tax evasion in violation of § 7201 of Title 26 of the United States Code as charged in the Fifth Count of the Indictment herein.

Dated: May 14, 1976.

CHARLES B. RENFREW
United States District Judge

Appendix H

Letter of William D. Howard dated December 29, 1972

December 29, 1972 I:WDH:cy

DeWAYNE F. TITUS
1273 Industrial Parkway West
Hayward, California 94544

Dear Mr. TITUS:

Your income tax liabilities for the years 1966 to 1969, inclusive, have been under investigation by this Division. Evidence has been discovered indicating a willful attempt by you to evade your income taxes.

The case file covering the investigation has been forwarded to the Regional Counsel, Internal Revenue Service, Room 628, 447 Sutter Street, San Francisco California 94108, with a recommendation that criminal proceedings be instituted.

Sincerely yours,
WILLIAM D. HOWARD
Chief, Intelligence Division

Appendix I

JAMES L. BROWNING, JR.
United States Attorney

JOHN M. YOUNGQUIST
Assistant United States Attorney
Chief, Tax Division
16th Floor Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: 556-3213
Attorneys for Plaintiff

In the United States District Court for the
Northern District of California

NO. CR-74-0499-CBR

United States of America,
Plaintiff,
vs.
DeWayne F. Titus,
Defendant.

[Filed: June 10, 1975]

AFFIDAVIT OF JOHN M. YOUNGQUIST
IN OPPOSITION TO MOTIONS OF DEFENDANT

State of California
City and County of San Francisco } ss.:

JOHN M. YOUNGQUIST, being first duly sworn, does depose and say:

1. I am a duly-appointed Assistant United States Attorney for the Northern District of California; my business address is that above shown; I am an attorney of record for plaintiff in the above-entitled action; and I have personal knowledge of the facts hereinbelow set forth, except those stated upon information and belief, and as to those, I believe them to be true.

2. I received copies of defendant's motion papers by mail on June 2, 1975, the originals having been filed with the Court on May 30, 1975. During the week of May 25th and through June 3rd, I was involved full-time in another important criminal case and was unable to devote any time to the present case. Following the spirit of the Court's statements at the last hearing in this case on May 15, 1975, it was my intention to hold an informal discovery conference with defendant prior to the date set by the Court for the filing of motions. Prior to May 20th, I arranged an appointment to meet with defendant for such conference on May 29th. Because of my commitment on the other case, it was necessary to postpone and reset the conference for June 5, 1975, at which date the conference was held commencing at approximately 10:00 A.M. in the offices of the United States Attorney in San Francisco.

3. Due to the devotion of time necessary to preparing for the discovery conference—principally, the identifying and copying of voluminous documentary evidence—I was unable to complete, file and serve a formal response to defendant's motions on or before June 6, 1975, as heretofore ordered by the Court at the May 15th hearing. I have worked diligently on the response, incorporating the fact and results of the discovery conference therein, and have completed, filed and served it, together with this and the other supporting affidavit, at the earliest time that I could, on June 10, 1975, within the time provided for oppositions to motions under Local Rule 205(d), but beyond the date

set by the Court. For this I apologize to the Court and request its leave for the late filing and service.

4. The discovery conference was held over two days—June 5 and 6—during the morning hours, to accomodate defendant's physical condition. Present were the defendant *in pro. per.* (without any accompanying representatives), myself, IRS special agent Ronald C. Williams, and from time to time IRS revenue agent Lee R. Schneider who assisted in handling copies of documents. The entire conference was recorded on separate tape recorders, with defendant's knowledge, for the purpose of having a complete record of the proceedings in the event that any future questions arise as to what was done and said. Defendant was given possession of the recorded tape from one machine at the close of each day's session. At the conference I went through the indictment with the defendant giving him complete particulars as to the government's contentions with respect to each adjustment in the subject tax returns comprising the alleged fraudulent items. Defendant has thus received a bill of particulars from the government without having moved from one. I provided defendant with copies, at government expense, of all documentary items of evidence presently in the government's possession and intended for possible introduction at trial. I further gave defendant copies of all of his statements, comprising memoranda of all interviews with him by government agents during the investigation, together with reported transcripts of his testimony in various bankruptcy proceedings, which may also be used at the trial. I also gave defendant a copy of his criminal record ("rap" sheet) obtained by the government during the investigation from the California State Bureau of Criminal Identification. Lastly, I gave defendant an oral listing of all witnesses whom the government may call for testimony at trial.

5. I first received the referral of this case for commencement of proceedings, leading to presentation of a requested indictment by the grand jury, from the Assistant Attorney General in charge of the Tax Division of the Department of Justice in Washington, D. C., by a letter dated February 19, 1974, and received by me on February 25, 1974. After reviewing the volumnious files in the matter, I requested the IRS District Director's office to provide an up-date on Mr. Titus' then physical condition in view of his statements during the investigation regarding his family's and his history of heart disease. Thereafter, being satisfied that he was not hospitalized and did not appear so disabled as to be unable to stand trial, I commenced presentation of the case to the grand jury on July 24, 1974. Several witnesses were subpoenaed and testified before the grand jury in the matter, and on August 7, 1974, the indictment in this case was handed up. At no time during the period from February 25, 1974 to July 24, 1974, did I delay presenting the case to the grand jury for the purpose of harrassing or gaining any tactical advantage over the defendant. My concern at all times during that period was whether the case was "prosecutable" in view of defendant's health. As the Court is aware, defendant has raised the question of his health in the post-indictment proceedings in this case to date, causing an extended delay in going to trial. The Court has now found defendant, upon expert independent medical opinion, capable of standing trial, and the trial date is presently set for July 7, 1975.

6. I am informed and believe that the Department of Justice in Washington first received referral of this case with recommendation for prosecution from the Internal Revenue Service's Western Regional Counsel by letter dated July 25, 1973, and that during the period from that date to February 19, 1974, when it was forwarded to the office of the United States Attorney for this District, the case was under full review by attorneys with the Criminal

Section of the Tax Division of the Department in Washington in order to determine if it merited prosecution. I am further informed and believe that at no time during that review was forwarding of the case "delayed" for the purpose of harrassing or gaining any tactical advantage over defendant. I am further informed and believe that, during that period of review, the question of Mr. Titus' health was raised in his behalf before the Department's reviewing attorneys by his representative.

7. I am aware of no electronic surveillance having been used to gather evidence of leads to evidence in any manner in the investigation of this case. I have questioned the special agent in charge of the investigation (Ronald C. Williams; see his accompanying Affidavit) and am satisfied that his denial that any such electronic surveillance was used is true and correct. Furthermore, I am aware of no instances of illegal entries into premises or the opening of United States mail having been used in this investigation to obtain evidence or leads to evidence. I am satisfied, again on my questioning of agent Williams, that there were none.

8. The only photographic surveillance of defendant that occurred in connection with this case is that, of which the Court is already aware, instituted by me in January 1975 on the collateral matter of defendant's claim that his physical condition prevented him from standing trial. Such photographic surveillance was undertaken in good faith by agents at my direction and supervision for the sole purpose of ascertaining if defendant was in fact totally disabled by his heart disease and was accordingly conducting his daily activities in a manner consistent with those of a totally disabled person. No surveillance of any kind other than personal observation and photography by agents was involved in that collateral matter and no photographic surveillance was involved in the investigation of the case.

Any existing logs, records and photographs respecting the collateral matter are completely irrelevant and immaterial to the issues before the Court on defendant's present motions going to the merits of the charges contained in the indictment.

JOHN M. YOUNGQUIST

Subscribed and sworn to before me this 10th day of June, 1975.

(SEAL) MARY LOUISE HUTCHINSON

Notary Public, City and County of San Francisco, State of California. My Commission Expires Aug. 2, 1975.

Appendix J

State of California
County of Alameda—ss.

Affidavit of DeWayne F. Titus

DEWAYNE F. TITUS, being first duly sworn deposes and says:

1. I am the defendant in the within cause. I have personal knowledge of the facts hereinbelow set forth, and if sworn as a witness could testify competently thereto.

2. I have read and examined the medical reports attached hereto and designated as exhibits C, D, E, and F. The recitals of my personal and medical histories contained in those reports were obtained from me, and I confirm their accuracy, except insofar as enlarged or modified in this affidavit.

3. In preparation for each and every court appearance, to date, in the within cause, I have utilized sedatives (meprobamate) prescribed for me by Dr. Roger B. Johnson. The anticipation of court appearances has consistently been so upsetting to me that I feared that I might collapse in court if I did not take those medications.

4. In anticipation of the two visits to Dr. Rapaport, I experienced similar anxiety, and prepared for the ordeal by taking meprobamate. The effect of this sedative was to relax me. Dr. Rapaport, at no time, inquired about any medications I had taken in expectations of my visits with him. I was not mindful of having taken them when I was with him, so forgot to mention it.

5. With regard to my hospitalization on June 19, 1975, I had followed my normal course of medication on that day, up to the time of my attack.

6. I was aware I was under investigation by the tax authorities at least as early as 1968. As that investigation proceeded, it became increasingly obvious to me that more and more other people, business contacts, friends, and even strangers, were cognizant of these inquiries. As time wore on, the matter of my tax investigation became more openly discussed, and many questions were asked of me, by curious, but disinterested persons. At first the questions were merely annoying. Later they were embarrassing. Later still, I realized that, to many, I was already considered guilty of some offense, and that I was the object of much talk, discussing my assumed culpability. Ultimately, after I was indicted, the matter became the subject of newspaper publicity. The observable effect of this process, was to convict me of a crime, in the eyes of many people with whom I had dealt. The total and cumulative effect of this growing circulation of my tax inquiry was to generate in me increasing worries and anxieties culminating in great apprehension of a criminal charge, and climaxing with the dreadful reality of so being charged.

7. During this period I suffered severe problems in obtaining credit and expanding my business. Based upon such remarks as have been made, I concluded that the tax investigation contributed heavily to this problem. Whether or not this is the fact, I was under constant and growing stress over the worry about the damage tax prosecution would do to me in business.

8. During the period until their deaths, I had some security in the knowledge that Eileen Emmons Smith and Warren Haskell were available to help me to explain all my financial and reportable business transactions. These two people actually handled my internal books, personal and business, and my purchasing, billing and other financial matters. I knew that they could explain how little I actually had to do with those matters, that I was prone to delegate such matters to others, mostly to the two of them. My own knowledge of my own affairs was relatively small, in this detailed area, but I had no concerns, so long as these two were alive. Both died. Smith died late in 1974. Haskell died in 1972.

9. I do not know when the problem first began to affect me, but over the past several months, with increasing regularity, I have suffered difficulties remembering things, even things of recent occurrence. I have had emotional disagreements with my fiance over such lapses, and mis-recollections. Prior to my attack in 1973, and, as I recall, well into 1974, I was confident of the value of what had once been an excellent memory. No longer to have this sense of mental security has only added to my general anxiety over what will become of me in this case.

10. I am acutely conscious of the drain on my physical stamina resulting from my many attacks, the recurring pains in my chest, and, based upon information given to me by Dr. Johnson, the necessity that I follow my medical regimen. I tire easily. I find it difficult to concentrate. I am always edgy and nervous.

11. Overriding all of the other distress of which I am conscious, I find myself preoccupied with thoughts about my own imminent death. In the past few years I have buried two of my brothers, who died of heart attacks. My other brothers died earlier, of the same disease. I was concerned over my own possible tendency to follow their path, even before any severe attacks. Since 1973, and particularly since my recent heart surgery, with what has felt like even more disability inside my body, I find it increasingly difficult to be detached and philosophical about what is, to me, a looming reality of dying. At times, because of my preoccupation, I have little concern for this case, and how it goes. I have to resort to medication to regain my perspective, to realize the gravity of these charges, and enable myself to cope with the necessity of going on with my own defense.

/s/ DeWayne F. Titus
DeWayne F. Titus

Subscribed and worn to before
me this 24th day of July, 1975
/s/ Luanne Schley
Notary Public for said county
and state

(Seal) Luanne Schley
Notary Public
My commission expires Nov. 20, 1976

Appendix K

The following pages are Section Two of a brief entitled Supplemental Transcript References filed with the Court of Appeals.

2. The Significant Pretrial Delay Seriously Damaged the Defendant's Ability to Defend Himself Resulting in a Denial of Due Process.

The prejudice to the defendant from the delay in the prosecution comes in three areas: (1) missing documents and records which might be the basis for cross-examination of fading recollections or for affirmative defense of the charges; (2) deceased persons who could provide critical testimony about the Defendant, his business, his character, adverse witnesses or testimony about specific transactions which were the subject of factual disputes at the trial; (3) faded recollections of witnesses.

In evaluating these transcript references, the Court should keep in mind that the case presented by the United States at trial was substantially based upon the testimony of the prosecution witnesses, particularly that of Robert Greer.

Missing Records and Documents

In the testimony of Richard Thomas, he testified that he was unable to find many of his work papers. *RT 511.* Richard Thomas was the accountant who prepared the 1969 tax return for the defendant.

RT 1025. The Court was required to rely upon the personal copies and handwritten notes regarding stock transactions involving the DYMO stock. The DYMO stock

allegations were principally based upon a "basis" issue involving a purchase of the stock through a merger approximately 13 years before the trial took place.

RT 1071. RT 1085. These references include more documents relating to the DYMO issue which were missing. The missing documents included the merger acquisition papers.

RT 1098-1099. This reference shows that the rent checks were missing for the "church" rents. The Court was required to rely upon copies which were partially illegible. RT 1099.

RT 1162, 1163. The checks relating to the Smith rents were missing. The court was forced to rely upon copies.

RT 1181. At this reference, it was discovered that the title company file for the escrow of the 7 Acre parcel in Alameda was missing.

RT 1202. The loan commitment letter for the sale of the 20 acre parcel was missing from the files of Eureka Federal Savings. The court was forced to rely upon faded recollection.

RT 1240. An original check paid to Mr. Titus was missing.

RT 3204:21-3205:07. DYMO records are missing.

RT 3706:19; RT 3718-3719. Bank records regarding the defendant's transactions were missing because they had been destroyed by the bank. Interestingly, the government relies here on the *absence* of records to rebut evidence by the defendant. These records involved the sale of the 20 acre parcel and the disposition of the proceeds of that sale.

Deceased Witnesses

Eileen Emmons Smith. During the course of the pre-indictment delay by the Government, Mrs. Smith died of cancer. She was Mr. Titus' chief bookkeeper and would have played a significant role in rebutting the testimony of Robert Greer, both on the issue of his lack of credibility due to alcoholism *(RT 527-529)*, and regarding the records and information which was available to Mr. Greer when he was preparing Mr. Titus' tax returns. *RT 582, 594, 818, 901, 1634, 615, 818 and 3086.*

Fred Bitterman. Mr. Bitterman was a key figure in the negotiation and closing of the sale of the 20 acre parcel. His presence at trial would have assisted the defendant in showing that he did not have advance knowledge of the sale. Mr. Bitterman was mentioned no less than 29 times in the course of the testimony at trial. *RT 1226, 1230, 1231, 2767, 2896, 2905, 2768, 2773, 2981, 2986, 2993, 2995, 2996, 2997, 2998, 3113, 3325, 3326, 3332, 3390, 3343, 3344, 3345, 3346, 3353, 3354, 3410, 3411, 3413.*

Faded Recollections

Many of the principal witnesses suffered from faded recollections in their attempts to recall long past events. Defendant here summarizes those for principle witnesses.

Robert Greer. Mr. Greer was a central witness in the government's case against the defendant. Key elements of every count of the indictment rested upon the credibility of the former alcoholic who was recalled to the stand at least three times in the course of the trial. The memory failures by Mr. Greer punctuated his testimony innumerable times. *RT 415, 416, 426, 427, 431, 436, 437, 443, 453, 456, 457, 469, 465, 476, 476, 493, 497, 510, 515, 516,*

518, 536, 557, 562, 564, 571, 573, 575, 582, 585, 586, 590, 592, 595, 604, 605, 620, 622, 623, 624, 625, 627, 628, 629, 630, 631, 632, 633, 635, 636, 637, 638, 642, 643, 649, 650, 654, 659, 662, 663, 667, 668, 669, 677, 681, 682, 683, 684, 685, 686, 687, 699, 707, 708, 716, 727, 745, 747, 748, 751, 771, 772, 783, 784, 2942, 2951, 2958, 2962, 3004, 3014, 3017, 3018, 3032, 3035, 3037, 3041, 3043, 3044, 3045, 3050, 3053, 3054, 3063, 3084, 3085.

Richard Thomas. The accountant who had prepared the defendant's 1969 tax return, and who was without the benefit of many of his working papers, was also unable to recall many of the events which had occurred over four years before. His memory failed him over 30 times. *RT 809, 810, 812, 813, 814, 815, 817, 818, 828, 833, 840, 841, 847, 848, 850, 853, 860, 862, 866, 867, 869, 870, 871, 875, 885, 886, 887, 893, 898, 899, 900, 914, 915.*

W. J. Knowles. Mr. Knowles was Mr. Titus' attorney for many of his personal and business affairs. He had a detailed involvement in many of the day-to-day decisions involving the handling of Mr. Titus' affairs. His recollection was severely hampered by the elapsed time. *RT 1649, 1656, 1674, 1674, 1678, 1682, 1684, 1687, 1688, 1690, 1692, 1699, 1700, 1702, 1703, 1704, 1705, 1706, 1708, 1717, 1719, 1721, 1731, 1732, 1736, 1737, 1743, 1749, 1752, 1766, 1767, 1770, 1771, 1778, 1779, 1801, 1802, 1803, 1811, 1815, 1820, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1845, 1857, 1859, 1872, 1873, 1874, 1875, 1893, 1898, 1907, 1908, 1927, 1930, 1943, 1945, 1952, 1954, 1955, 1957, 1958, 1961, 1962, 1963, 1964, 1969, 1971, 1975, 1979, 1980, 1989, 1990, 2005, 2007, 2016, 2017, 1051, 1052, 1053, 2059, 2061, 2065, 2066, 2080, 2084, 2088, 2089, 2091, 2104.*

The combination of the loss of records, the loss of testimony of the deceased witnesses and the baded, and probably distorted recollections of the key witnesses caused significant prejudice to the defendant; when combined with the serious deterioration of his health which came about during the preindictment delay, it amounts to a denial of due process.

No. 78-37

In the Supreme Court of the United States

OCTOBER TERM, 1978

DEWAYNE F. TITUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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DEWAYNE F. TITUS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he suffered actual prejudice and was denied his Fifth Amendment right to due process because of a 19-month interval between the completion of the investigation and the return of the indictment against him in this criminal tax case.

Following a non-jury trial in the United States District Court for the Northern District of California, petitioner was convicted of willfully attempting to evade income tax for 1967-1969, in violation of 26 U.S.C. 7201; and of filing false tax returns for 1967 and 1968, in violation of 26 U.S.C. 7206(1) (Pet. App. 44-49). The district court sentenced him to two years' imprisonment and imposed a fine of $18,000 (Pet. App. 6-9). The court of appeals affirmed (Pet. App. 2-5).[1]

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[1]The petition is out of time. The court of appeals denied a petition for rehearing with a suggestion for rehearing *en banc* on May 25, 1978 (Pet. App. 1). On June 26, 1978, Mr. Justice Rehnquist denied

The court of appeals correctly held that petitioner did not demonstrate that he was prejudiced as a result of the 19-month interval between the completion of the Internal Revenue Service investigation and the return of the indictment. As this Court held in *United States* v. *Lovasco*, 431 U.S. 783, 789-790, the threshold question in assessing a claim of preindictment delay is whether the defendant suffered actual prejudice. If the delay in fact resulted in prejudice, the court must then examine the reason for the delay to determine whether it was impermissible under the circumstances. *Id.* at 788-796. See also *United States* v. *Gray*, 565 F. 2d 881, 892 (C.A. 5); *United States* v. *Lane*, 561 F. 2d 1075, 1077 (C.A. 2); *United States* v. *Partyka*, 561 F. 2d 118, 122 (C.A. 8); *United States* v. *Matlock*, 558 F. 2d 1328, 1330 (C.A. 8).

Here, as in the court of appeals, petitioner claims prejudice on the basis of "his deteriorating physical condition, missing documents, death of three witnesses, and faded recollections of other witnesses" (Pet. App. 4). But as the court of appeals pointed out (Pet. App. 4-5), petitioner's assertion that the testimony of three witnesses who died prior to trial would have assisted him does not amount to the kind of non-speculative demonstration of actual prejudice required by *Lovasco*. See *United States* v. *Pallan*, 571 F. 2d 497 (C.A. 9); *United States* v. *Gray*, *supra*; *United States* v. *Partyka*, *supra*. Indeed, the testimony of those witnesses would have been simply cumulative of other evidence in the case or of limited value in the impeachment of one prosecution witness (see Pet. 6-8, 17-19). Moreover, petitioner has not demonstrated how his "deteriorating" health (see Pet. 20-21) or allegedly missing

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petitioner's application for an extension of time within which to file a petition for a writ of certiorari. The petition for a writ of certiorari was not filed until July 5, 1978.

documents hampered his ability to present a defense. In sum, petitioner has not demonstrated with any specificity that he suffered any prejudice as a result of the preindictment delay, and the court of appeals' conclusion in any event presents no issue of general importance warranting review by this court.

Moreover, even on the assumption that petitioner established actual prejudice, his claim fails because he did not show that the delay was invidious as required by *Lovasco*. Petitioner does not even allege that the 19-month interval between completion of the investigation and the indictment was itself unreasonable or that the government delayed the indictment for an improper purpose.

The delay in this case between the completion of the special agent's investigation and the return of the indictment is not at all unusual for a criminal tax case of this type and complexity. The agent's recommendation was first reviewed within the Internal Revenue Service prior to referral of the case to the Tax Division of the Department of Justice, where it was subject to an independent review. During this period, petitioner raised the question of the propriety of prosecution in view of his physical condition (Pet. App. 54-55). The case was then transmitted to the United States Attorney, who again considered petitioner's physical condition before presenting the case to the grand jury (Pet. App. 54). Thus, at no time was the case "delayed" for the purpose of harassing or gaining any tactical advantage over petitioner. To the contrary, any delay was the result of great care taken by the government in determining whether petitioner should be prosecuted (Pet. App. 54-55).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

AUGUST 1978.

DOJ-1978-08